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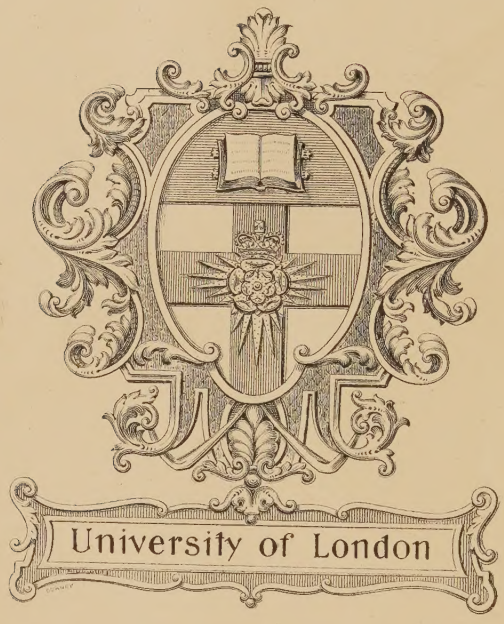

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1942.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL:

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR – – – RALPH SUTTON, K.C.
ASSISTANT-EDITOR – G. F. L. BRIDGMAN, *Barrister-at-Law.*

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OF THE

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OF

THE HIGH COURT OF JUSTICE.

1942.

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ERRATUM.

[1942] P. 57, line 20 : for " prohibiting " read " prohibited."

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DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

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1941

April 1.

Divorce—Desertion—Prenuptial agreement to live at wife's residence—Validity—Public policy—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*)—*Matrimonial Causes Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2.

As a condition of marriage, the husband agreed at his wife's request to live after the marriage at her residence, where she conducted a business which was her means of livelihood. The wife was ignorant whether the husband intended to make any financial provision for her. Seven months after the marriage, there having been no material change in the wife's position or the circumstances with regard to her house, the husband removed to his former home in the neighbourhood and requested his wife to live with him there. She refused, and cohabitation was never resumed. On the husband's petition for divorce on the ground of desertion, with a cross-plea of desertion :—

Held, that the agreement as to residence not being invalid as being against public policy, the wife had reasonable excuse for refusing to comply with the husband's demand that they should

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go to his home and, therefore, she was not in desertion, but that the husband had been guilty of desertion.

HUSBAND'S PETITION for divorce.

On May 2, 1940, the petitioner, Harry Stephens King, presented a petition for the dissolution of his marriage on the ground that his wife, Fanny Walker King, had deserted him for a period of at least three years immediately preceding the presentation of the petition, namely, continuously since March 15, 1937. By her answer, dated June 13, 1940, and particulars thereof the wife denied desertion, alleged that the husband had deserted her for a period of at least three years immediately preceding the presentation of her answer, namely, in January, 1937, and prayed for a divorce. By his reply the husband denied having deserted his wife.

As a condition of entering the marriage, which took place on August 22, 1936, at Battersea register office, the wife stipulated that the husband should reside with her at a bungalow which belonged to her father and at which she carried on the cultivation of fruit and flowers for sale, kept cows and sold the milk, and in the summer took paying guests. At the date of the marriage the husband was a widower, aged 73, and the wife was 37. Soon after the marriage the husband pressed the wife to go and live with him at his old home in the neighbourhood which he preferred to hers. She refused. The husband went to his old home for several weeks, during which time the wife again refused to leave the bungalow, and he then left the district.

William Latey for the husband. The principle of the equality of the sexes has not gone so far as to entitle a wife to refuse to follow her husband to a suitable home of his selection, provided that he does his fair share in the maintenance of his wife and the home. This was clearly put by Henn Collins J. in *Mansey* v. *Mansey* (1). The right of consortium was so engrained in the law administered in the Ecclesiastical Courts that the remedy of restitution of conjugal rights was based on it, and, despite the fact that the law as

(1) [1940] P. 139, 141.

it has developed confers many privileges on married women, a wife's obligation to live with her husband where he makes his home still remains : see also the observations of Lord Cave in *Lord Advocate* v. *Jaffrey* (1). It is significant that the wife in the present case never sought restitution of conjugal rights or brought proceedings alleging desertion until she did the latter by way of recrimination. Had she done so, the husband might successfully have pleaded just cause. Her refusal to go to her husband's house was based on the agreement by her husband to live at her house, but at the highest that agreement could not be regarded as more than a provisional promise dependent on the vicissitudes of life. Such a condition for the marriage was not only not binding on the husband, but it was invalid as being repugnant to public policy. The agreement, if it went so far as the wife now asserts, was obviously tainted with a harmful tendency, to use the expression of Lord Atkin in *Fender* v. *St. John-Mildmay* (2), because the practical result—which Lord Lyndhurst said in *Egerton* v. *Brownlow* (3), the locus classicus on the law relating to public policy as it affects agreements, ought always to be regarded—of this agreement was to fortify the wife's resolve to break up the marriage rather than leave her house. The bargain, if it was accepted as an agreement by the husband to live for ever at his wife's house, must be entirely disregarded as contrary to public policy, and that leaves the wife with no answer to her husband's legitimate demand that she should live with him at what was clearly a suitable home. There is no direct authority in the reports on this point. Perhaps the closest analogy was in *Brodie* v. *Brodie* (4), in which, on a wife's petition for restitution of conjugal rights, the husband set up a plea of just cause by way of an ante-nuptial agreement to live apart which had been confirmed after the marriage, and Horridge J. held that the agreement was against public policy. Here the wife is undoubtedly in desertion, and there is scarcely any evidence in support of her counter-plea of desertion.

(1) [1921] 1 A. C. 146, 157–158.
(2) [1938] A. C. 1, 18.
(3) (1853) 4 H. L. C. 1, 160, 162.
(4) [1917] P. 271.

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Herbert Malone for the wife. The husband entered into a contract that he should live in his wife's house as their matrimonial home. He is in breach of that contract, and he cannot be heard to say that his wife deserted him. On the other hand, she can say: "I entered into this marital contract "on condition that you lived at my house. You failed to do "so, and, therefore, I am not bound to cohabit with you." The husband left the agreed matrimonial home and went away from the district, and he thereby deserted his wife. No principle of public policy can be invoked with regard to this agreement. It was a perfectly reasonable and fair agreement in all the circumstances, and one which was quite devoid of any harmful tendency.

THE PRESIDENT (LORD MERRIMAN). At the time of the wedding the wife was living and conducting at least three businesses in a bungalow and on land owned by her father. The husband had retired from the service of a railway company, and there was no business reason why he should wish to live in a particular district or in a particular house in a particular district. The wife, on the other hand, was occupying the bungalow for the purpose of earning her livelihood. The husband had a son by a former marriage. There was no suggestion of any undertaking in connection with the second marriage that the husband should make any permanent financial provision for the wife, and I understand that she was left in complete ignorance whether he even intended to leave her anything under his will. In these circumstances, there being no pretence on either side that the marriage was one of very ardent affection, nor could it be expected to be, the wife naturally thought about her future. Her future was bound up with this bungalow, and, as she saw it at the time of the marriage, unless she were able to keep up her activities there, she might be left completely destitute, in the event, which could not be very long delayed, of her husband's death. Accordingly she stipulated that the matrimonial home should be at the bungalow, and not at the husband's house, and I am satisfied that she made it perfectly clear that she would

not consent to marry the husband except on that condition. I also have no doubt that the husband accepted the condition without any qualification, and shortly after the marriage he signed a yearly tenancy agreement jointly with the wife. I have, however, further come very definitely to the conclusion that he meant to get out of this bargain or understanding at the earliest convenient moment. Things came to a head on or about January 11, 1937, when the husband in effect insisted that the wife should leave the bungalow and go and live with him at his former home in the neighbourhood. Having delivered this ultimatum, for it was no less, to his wife, and she having insisted on adhering to the arrangement to which they had come, the husband demanded back from her a ring belonging to his first wife which he had allowed her to use, and at or about the same time he handed back to her his key of the bungalow. There is an air of finality about both those acts. It is plain that the husband, without any sort of agreement on the wife's part, and without consulting her wishes in the matter at all, had decided that for the future he intended to live at his former home—with his wife if she would accompany him, without her if she would not—and that he was taking the stand that he had an absolute right to dictate to her. In my view, the arrangement at which they had arrived about living at the bungalow was in the circumstances eminently reasonable. The house was in every way suitable, and there was a valid business reason why it should be chosen as the matrimonial home while there was no business reason why the husband's old home should be chosen. The only thing which affected the matter in any way, but not, I think, in any material degree, was the fact that the wife had been ordered by her doctor not to continue for the time being the hard work which was involved in looking after her cows. Save for that, the circumstances remained exactly as they had been. The question to what extent guests would be taken during the following summer would depend on circumstances. She did not intend to keep the guest-house going at its full capacity, because that would not be possible, having regard

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to the fact that the husband was living in the house, but she would have been able to keep together her connection which would have been lost altogether if she had given up the bungalow and gone to her husband's house. [His Lordship read certain letters which had passed between the parties, and continued:] Apart from the fact that the husband had already shown, by surrendering the key of the bungalow and by demanding back the ring, that he regarded the parting as final, I have evidence in his letter of March 30, and his subsequent conduct which satisfies me that he was taking advantage of the fact that his wife was adhering to the arrangement to get rid of his obligations to her. In the correspondence the wife always took her stand on the basis that she had only accepted the husband in marriage because he had agreed to the arrangement to live at the bungalow.

I have now to deal with the arguments which have been put forward by Mr. Latey on this basis. I ventured to express the view, with which Mr. Malone, at any rate, now agrees, that both sides were putting their cases much too high. Mr. Malone said: This bargain was a vital condition of the marriage, with the corollary that, as soon as the husband broke the condition, the wife was entitled to break the contract of marriage. That, of course, is absurd. For reasons which it is obviously unnecessary to go into, one cannot apply a rule of that sort to a contract like a contract of marriage. Whether, if the husband before marriage had shown an intention to go back on the arrangement, that would have been an answer, for example, to a suit for breach of promise of marriage, is another point, and I need not go into that. It is quite obvious that no such considerations can be invoked in respect of the contract of marriage itself after it has been entered into. But I think that the wife was able to say, in answer to a charge of desertion, that she had a valid ground for refusing to go to her husband's house and he could not turn her into a deserter by going back on his word for no reason whatever. I am bound to say that I should have very great difficulty in the circumstances of this case, on any view of the matter, in finding that the wife deserted the

husband, because she took up this stand, unless it be, as Mr. Latey argued, that I have to ignore the agreement altogether as being contrary to public policy.

The question whether the wife can make out a case of desertion against the husband is more difficult. Mr. Latey's argument can be put in two ways, or rather as embracing two propositions. First, that the husband was entitled to dictate to his wife where the matrimonial home should be. Secondly, that if any agreement to the contrary was made before the marriage, it is contrary to public policy and cannot affect the matter one way or the other. I am going to take the latter proposition first. I am bound to say, although Mr. Latey has given me some weighty pronouncements on the subject of public policy from well known authorities, that none of them seems to come very near to the present case. I think that the best expression of the principle is to be found in Lord Atkin's speech in *Fender* v. *St. John-Mildmay* (1), where he says that, in addition to acts which are contrary to public policy because to do them must be injurious to public interests, the doctrine is also applicable to arrangements which have harmful tendencies, although he points out that, whereas in the case of agreements to do acts harmful of themselves, the judge can obtain some sort of a foothold, in the case of a harmful tendency, the ground is less safe and more treacherous. He says (2): "But assuming, as we must, that the harmful "tendency of a contract must be examined, what is meant by "tendency? It can only mean, I venture to think, that taking "that class of contract as a whole the contracting parties will "generally, in a majority of cases, or at any rate in a con-"siderable number of cases, be exposed to a real temptation "by reason of the promises to do something harmful, i.e., "contrary to public policy; and that it is likely that they "will yield to it."

I have asked, and I am bound to say I think I have asked in vain, for any light on the harmful tendency of the bargain which was entered into in this case. To put it plainly, the argument goes in a circle. It had already been stated one

(1) [1938] A. C. 1, 12. (2) Ibid. 13.

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way round that the husband was entitled to dictate and that any agreement to the contrary must be contrary to public policy, and when I asked what was the harm in this particular agreement, I was told, in effect, that it stopped the husband from dictating. So we do not really get any nearer the alleged vice of it. If the agreement meant that in all circumstances and for all time, whatever happened to this marriage, the wife was entitled to say : "I live at the bungalow. "I will never move," there might be something to be said for the evil tendency of any such ante-nuptial bargain, but I do not think that that is the effect of this bargain. I think that it means, and could mean, no more than that, for good reasons common to both sides, the parties agreed that rebus sic stantibus the bungalow was the proper matrimonial home. It does not mean that the wife was entitled to dictate the matrimonial home if the good reasons on which the agreement was based ceased to exist, or if some changed circumstances gave good reason for a change in the matrimonial home. The wife's reactions to this demand of the husband were never tested in the light of that because no change had occurred, but the husband had insisted on his right to dictate where the matrimonial home should be, and he took full advantage of that to drive the wife into a position in which she would be unable to claim any maintenance from him. Then he disappeared, and meant to disappear, from her ken for ever. In doing so, he afforded evidence on which I am entitled to hold, as I do, that from a date not later than the end of March, or the beginning of April, 1937, he had decided that the marriage had come to an end, so far as he was concerned, and he meant to put an end to it.

Speaking generally, I do not in the least dissent from the pronouncement by Henn Collins J. in *Mansey* v. *Mansey* (1) that a husband has the right to say where the matrimonial home shall be. But I do not think that in the circumstances of the present case the husband had the right, for no valid reason whatever, to go back on the understanding into which he had entered, and then to use that as an excuse for trying

(1) [1940] P. 139.

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to put the wife in the wrong, as he did, and having, as he thought, put her in the wrong, then to make up his mind to disappear from her life for ever. It was when that latter stage occurred, I think, that he was guilty of desertion, and I so hold.

His Lordship dismissed the prayer in the petition, and granted the respondent a decree nisi with costs.

Solicitors: *Peake & Co., for Ratcliffe, Son & Henderson, Falmouth; Burton, Yeates & Hart.*

W. L.

THE VERNON CITY.

1941

Jan. 14; *Feb.* 21, 24, 25; *May* 30.

Shipping—Collision—Convoy orders—Speed in fog—Abrogation of Regulations for Preventing Collisions at Sea—Defence (General) Regulations, 1939, *reg.* 43 (1.)—*Emergency Powers (Defence) Act*, 1939 (2 & 3 *Geo.* 6, *c.* 62), *s.* 1, *sub-s.* 4.

By s. 1, sub-s. 4, of the Emergency Powers (Defence) Act, 1939, it is provided that "a Defence Regulation, and any order "... made in pursuance of such a regulation, shall have effect "notwithstanding anything inconsistent therewith contained in "any enactment other than this Act ..."

By reg. 43 (1.) of the Defence (General) Regulations, 1939, made under the Act, the Admiralty was empowered to make navigation orders, and by reg. 43 (2.) the master of any vessel which contravened or failed to comply with any order so made was declared guilty of an offence.

In the exercise of these powers the Admiralty made an order, St. R. & O. 1939, No. 1157 (Navigation Order No. 1, 1939), providing that "British merchant vessels at all times and "Dominion vessels when in British territorial waters shall "comply with any sailing ... instructions which may ... be "issued to them by the Admiralty or by any person authorized "by the Admiralty to act under this order." The persons so authorized were the naval control officers, who in turn were empowered to delegate their authority to commodores of convoys. The sailing orders for ocean convoy provided that ships were to obey the orders of the commodore.

Two British ships, the *L.* and the *V. C.*, came into collision in a dense fog. The *L.* was a single ship; the *V. C.* was in convoy.

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The *L.* was proceeding very slowly; the *V. C.*, under convoy orders, was proceeding at seven knots:—

Held, that the *V. C.* had a paramount duty to obey the convoy orders, which were clothed with complete legislative authority, although they ran counter to the Regulations for Preventing Collisions at Sea as to speed in fog; that accordingly the *V. C.* was not negligent for proceeding at a speed which, if she had not been under special orders, could not be justified; and that on the facts neither vessel was to blame.

In the absence of special circumstances, a vessel in convoy navigating in fog, on hearing a whistle forward of her beam, should stop her engines in accordance with the regulations if she can do so without danger to the other vessels in the convoy.

Decision of Hill J. in *The Emlyn* [1918] P. 67, contrasted with his decisions in *The Algol* [1918] P. 7 and other cases, and distinguished.

Semble: Neutral vessels sailing in British convoys are subject to the same rules and liabilities and also obtain the same legal advantages as British-owned vessels in the same convoy.

ACTION of damage by collision (1).

The plaintiffs were the owners of the passenger steamship *Lairdscastle*, a vessel of 1945 tons gross, plying between Glasgow and Belfast. The defendants were the owners of the steamship *Vernon City*, a vessel of 4748 tons gross. The collision occurred about 5.49 A.M. on September 4, 1940, at the entrance of the River Clyde, the *Lairdscastle* sinking as a result of it.

The weather was a dense fog with visibility of about one cable or a little less. The *Lairdscastle* left Glasgow on the night of September 3, and, when off Ailsa Craig, ran into fog. The engines were reduced to slow and she began sounding the usual long blast for a vessel in fog. Before reaching a buoy at which she made a turn of four and a half points she heard whistles which were recognized as fog signals of ships which might form part of a convoy, but, as they were far away and not forward of the beam, it was not considered necessary to stop, and the *Lairdscastle* continued to advance, sounding for fog and at slow speed. Those on board then became aware of a motor vessel's horn sounding "sharp" on the starboard

(1) The action was tried in camera. The judgment, with certain deletions, is published with the approval of the learned judge and the Admiralty.—REPORTER.

bow and apparently close. The engines were stopped and put full speed astern. A few moments later the masthead light and, just afterwards, the body of the *Vernon City* were observed approaching the port side of the *Lairdscastle*. The *Vernon City* was not more than a ship's length away, and, before any measures could be taken on board the *Lairdscastle*, her stem struck the port side of the *Lairdscastle* which was still moving very slowly ahead with just steerage way.

The *Vernon City* was proceeding in a convoy of eleven ships and was the leader of the third column from the left of a total of four columns. The distances between columns were three cables and between ships in line two cables. The commodore ship was the *Tacoma Star*, which was on the port beam of the *Vernon City*. On account of the weather the speed of the convoy had been reduced from eight knots to seven, and the vessels, which had hitherto been carrying dimmed lights, were showing their lights with full power. The first notice which those on board the *Vernon City* had of the approach of the *Lairdscastle* was a long blast on their starboard bow. One long blast was sounded in reply, and after a very short interval a white light came into view on the starboard bow and the wheel of the *Vernon City* was put hard-a-starboard. In a few seconds the red light of the *Lairdscastle* was seen distant about a cable and the engines were stopped and almost immediately put full speed astern. Shortly after the collision with the *Lairdscastle* the *Vernon City* found herself in collision with the *Tacoma Star*.

Hayward K.C. and *Owen Bateson* for the plaintiffs. The *Vernon City* is to blame for excessive speed. Even if a speed of seven knots was ordered by the commodore of the convoy the defendants are liable, just as they would be if the ship was proceeding at too high a rate of speed under the orders of a pilot. The *Vernon City* should have disobeyed the instructions if it was necessary to do so to avoid immediate danger. Although there may be a general duty to obey convoy instructions, at the material time the conditions were such that there was an overriding duty on the *Vernon City* to proceed with

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caution, i.e., at a speed considerably less than seven knots, to sound her whistle in accordance with Board of Trade regulations, and to stop on hearing the whistle of the *Lairdscastle* forward of the beam.

Sellers K.C. and *E. W. Brightman* for the defendants. There was negligence by the *Lairdscastle*, which had a duty to avoid ships in convoy and could have done so. An Admiralty Notice to Mariners of 1939 emphasized the duty of single ships to avoid convoys, while, on the other hand, by the Sailing Orders for Ocean Convoy, ships in convoy must obey the orders of the commodore of the convoy from which they must not depart unless and until their own safety or that of another vessel is so imminently threatened as to amount to almost certain peril if the convoy orders are continued to be followed. There was, therefore, no negligence by the *Vernon City* in proceeding at the prescribed speed of seven knots. The convoy was sounding fog signals. As regards the stopping of the engines, there is always a danger in fog that by so doing a vessel may come into collision with other vessels in the convoy. The *Vernon City* did in fact stop and reverse her engines as soon as the lights of the *Lairdscastle* were seen and very shortly indeed after her long blast had been heard.

Hayward K.C. replied.

Cur. adv. vult.

1941. May 30. LANGTON J. read a judgment in which he set out in detail the facts already summarized, and continued: On these facts it is necessary to resolve the questions which arise concerning the culpability for this collision. Was either, or neither, or were both of the two vessels concerned to blame for the occurrence? So far as the *Lairdscastle* is concerned, the answer is, to my mind, reasonably simple. As regards the *Vernon City*, however, it seems to me that a question of unusual difficulty and considerable importance arises. [His Lordship, on the facts, found that the *Lairdscastle* was not to be blamed in any respect for the collision, and continued:] The *Vernon City* is in far different case. In the prevailing weather conditions it could not be suggested that seven knots was a

cautious or proper speed. In addition, when she heard the whistle of the *Lairdscastle* for the first time forward of her beam, she did not immediately stop her engines. The time which elapsed between her first hearing and first sighting the *Lairdscastle* was very short indeed, and the engines of the *Vernon City* were in fact stopped practically at the same moment as the *Lairdscastle* was sighted. It is possible, therefore, that on this second point the *Vernon City*, even if she had been navigating alone, might find excuse on the ground that the time involved could not have affected the collision, but on the question of speed, if she had not been proceeding in convoy or under special orders, there could be no conceivable ground for forgiveness. The question, therefore, arises in the clearest possible form, whether the convoy orders in a matter of this nature take precedence of or are to be considered paramount to the international collision regulations.

I regret that when this matter was before me I did not realize to the full its many and varied implications. In consequence I did not obtain assistance which I should have greatly valued in the arguments of counsel. In particular, none of the cases which I now propose to discuss was cited before me, and I have been obliged to range and analyse them without counsel's aid. Mr. Hayward took the point that it was no answer to an innocent ship, which had been sunk, to pray in aid that a breach of the collision regulations which had caused the disaster had been committed under Admiralty orders. Unfortunately, however, he confined his argument to an analogy which made but small appeal to me. His analogy was founded on the situation of a shipowner under compulsory pilotage as the law stands to-day, and he argued that, just as a shipowner is now debarred by law from putting forward as an excuse for the negligence of the compulsory pilot the fact that the pilot has been imposed on him without his consent by a superior authority (1), so the *Vernon City* in the present instance could not set up as an excuse for negligent conduct the orders of a superior

(1) See Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), s. 15, sub-s. 1.

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authority. I cannot agree that a statutory exception, limited narrowly in its operation, offers much ground for analogy or example in considering a matter which raises a general principle of law. Moreover, from the shipowners' point of view, it would seem more than a little hard, to argue that, because a special disability has been imposed on them by statute, this fact provides warrant, by analogy or otherwise, for imposing a still wider general disability on a deserving class of the community. A better and more fruitful method of approaching this question than by the indirect path of analogy seems to me, first, to see what can be gleaned from authorities, and then to examine the source and ambit of the orders which are claimed to override the collision regulations.

The decisions which I have found to be in any way in point are five in number, and are all decisions of the late Hill J. in matters arising out of the last European war. If he does not always appear to speak with the same voice throughout these decisions, it will be remembered that during the years when they were rendered the learned judge was working at very high pressure and with very little time at his disposal to collate or to refer to his previous utterances. Nor can I find in the reports of these cases any suggestion that the broad point of collision regulations versus convoy orders was ever argued before him in full, or plumbed to what might be its rather extensive depth.

The first of the cases and perhaps the most important was *The Algol* (1). The case arose out of a collision in the English Channel between two neutral steamships which, by reason of the danger of German submarines, were both navigating without exhibiting any underway lights. The judge found that neither ship was guilty of any delay in exhibiting a sidelight after becoming aware of the presence of the other ship. He noted in his judgment that on June 9, 1917, the Lords Commissioners of the Admiralty had issued under the Defence of the Realm Regulations an Admiralty notice to mariners (No. 581). Since, however, the collision had happened

(1) [1918] P. 7.

on March 16, 1917, the notice was clearly not in point in the case under consideration. For present purposes it is not unimportant to observe the terms of the notice which are as follows: "This order provides that the orders contained "in the Admiralty War Instructions for British merchant "ships, or in any instructions or advice given to masters of "vessels by British or allied naval officers or by other duly "authorized officers or officials, as to routes to be taken and "precautions to be observed to avoid capture or destruction "by the enemy, are to be observed even when they are in "conflict with the provisions of the Regulations for Preventing "Collisions at Sea, and every vessel observing such regulations, "instructions or advice, shall be deemed to be taking measures "to meet 'special circumstances' within the meaning of art. 27 "of the Regulations for Preventing Collisions at Sea."

So far as I have been able to discover no similar notice has been issued by the Admiralty during the present hostilities. The portions of the judgment of Hill J. which seem to me to be specially in point are in these words (1): "Prima facie "the *Algol*, like the *Embla*, was not complying with the "regulations. She was not carrying lights, as required by "arts. 1 and 2. But the articles must be read as a whole, "and they include art. 27. In obeying arts. 1 and 2 the *Algol* "was by art. 27 bound to have due regard 'to all dangers of "'navigation and collision, and to any special circumstances "'which may render a departure from the above rules "'necessary in order to avoid immediate danger.' Now the "war, and the complete disregard by the Germans of all rules "of international law and of the practice of civilized peoples "in the conduct of war, had brought into existence at the "time of, and before, this collision, a new danger of navigation "in an area of the high seas which certainly included the area "in which the *Algol* and *Embla* were navigating, and to that "danger all ships, not merely of the allies but of neutrals, the "*Embla* no less than the *Algol*, were exposed. Having regard "to that danger, the Admiralty authorities . . . . had "recommended that lights should be carried only as they

(1) [1918] P. 12, 13.

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"were in fact carried. The *Embla*, which was sailing under "convoy, would have been permitted to join the convoy "under no other conditions. The *Algol* was not under convoy, "but was one of a number of ships which were crossing the "channel that night, and she was acting under that advice. "The advice was applicable to the locality in which the ships "were navigating, as clearly appears from the fact that the "*Embla* was under convoy and received the advice. The "experience of this court has taught me that this advice "has been very generally followed by seamen. If it be a "question for the Elder Brethren, they tell me that to act "in accordance with that advice at the time and place in "question was to act as a prudent seaman would act, and "I entirely agree. I hold that in carrying their lights as they "did at the time and place in question both ships were doing "that which was justified, and, indeed, called for by a due "regard to the dangers of navigation, and that they were "not negligent. The present is not a case in which the "masters were setting up their own judgment against a "positive direction of the regulations, but one in which a "decision as to the best way of avoiding the dangers of the "voyages in question had been arrived at by those best "qualified to judge, and acted upon by navigators very "generally. It is said that in carrying no lights the ships "were only seeking their own safety, and ought not to be "permitted to do so at the risk of others. But, in truth, if "the *Algol* had been carrying her lights exhibited she might "have acted as a beacon to a submarine, and have endangered "not only herself but all others in her neighbourhood. It is "too narrow a view to say that she carried no lights for her "own safety only. I have so far based my decision on the "words ' due regard shall be had to all dangers of navigation.' "I prefer to rest it there, without deciding whether at the "time and place in question the risk of submarine attack was "a circumstance which rendered a departure from arts. 1 and 2 "necessary in order to avoid immediate danger. I incline, "however, to the opinion that at the time and place in "question the risk of submarine attack ought to be regarded

"as so imminent as to constitute immediate danger, and a "special circumstance within the second branch of art. 27; "and, if so, I think that the departure from arts. 1 and 2, "being recommended by the Admiralty authorities and "generally adopted, ought to be treated as a departure "necessary in order to avoid that immediate danger." By way of comment upon this judgment, I only desire to point out that it dealt with a specific point between two neutral ships, namely, the exhibition or non-exhibition of sailing lights under conditions well known and thoroughly appreciated by both parties. The danger from submarines was only too well known, and the practice of sailing without lights to avoid their attention was notorious.

In the second case, *The Emlyn* (1), which was a fog case, the learned judge seems to have approached the matter from a somewhat different standpoint. In this case the plaintiff vessel, the *Sheila*, which was passing up the French coast following an escort, was navigating at the moderate speed of two to three knots, but omitted to stop her engines on hearing whistles forward of her beam. The defendant vessel, the *Emlyn*, which was following in the wake of her escort, was under the orders of that escort proceeding at the excessive speed of eight knots. The orders which the two vessels had received were in both cases from the French Admiralty authorities. The learned judge deals with the rival contentions in the following way (2): "Was the speed or was "the non-stopping of the engines justified? It is said that "they were, first, because of orders received from the French "Admiralty authorities: and, secondly, because the circum-"stances of the war and the risks of submarines justified a "departure from the rules. I cannot agree. First, as to "orders. They were, to the *Sheila*: 'Follow the escort, obey "'all his orders'; and to the *Emlyn*: 'Follow escort—speed "'will be regulated by the patrol ahead—at eight knots.' "These orders were not directed to speed in fog, and, even "assuming they were compulsory upon the ships, as to which "there is no evidence, they cannot be construed as orders to

(1) [1918] P. 67. (2) [1918] P. 70.

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"disobey art. 16. Nor can the facts that the escort continued "at eight knots and did not stop her engines excuse the "convoyed ship from obeying art. 16. It was negligence in "the escort and no less negligence in the convoyed ship. As "to the second point, there is no evidence on which I can "find that the dangers of submarines in the locality in question "made it necessary to go full speed in a fog or not to stop the "engines and navigate with caution. I can in the present "case see no necessity in either the escorting or the escorted "ship for such conduct. . . . . It is further contended for "the *Emlyn* that her not stopping (if she had heard whistles "ahead) was justified by the presence of the rest of the convoy "astern. The question does not really arise, for she says she "did not hear whistles ahead. But, if it does arise, I have "asked the Elder Brethren whether in the circumstances there "was anything to prevent the *Emlyn* stopping, and whether "it was cautious and prudent navigation to continue on "without stopping. They advise me that it was not. . . . . "Both vessels, therefore, are to be blamed for a breach of "art. 16."

I confess that this decision causes me some little difficulty and seems hardly in line with other of the learned judge's decisions, but it is to be observed that he bases his conclusion to a certain extent on the lack of evidence to support the contentions argued before him. Taking first the orders, he appears to treat them as bare executive commands from the French authorities. As I shall presently point out the convoy orders under which the *Vernon City* was proceeding rest on far surer and more solid foundation. He even throws doubt on the point whether the orders were compulsory on the respective ships, and founds his conclusion against the *Emlyn* on the ground that the conduct of her escort was negligent and her own conduct no less negligent. Equally, on the question of danger, he bases his judgment on the absence of evidence of danger from submarines in the locality in question. I do not think that anyone would care to take this point against the *Vernon City*.

The third case is that of *Owners of the Chester Sun* v. *Owners*

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of the Neva (1). The plaintiff vessel, the *Chester Sun*, was on the port hand of three ships in line abreast accompanied by three destroyers. The *Neva*, also in convoy, was the second ship in the first line of a convoy of five columns. None of the ships in either convoy was exhibiting any lights. The plaintiff vessel claimed (inter alia) that the *Neva* failed to display her navigation lights in due time. The main case for the defendants seems to have been that the collision was due to the conditions under which the vessels were navigating, and could not have been avoided by the exercise of ordinary care and skill on the part of those in charge of the *Neva*. The report does not indicate that any question of law arose or was argued, and the learned judge, treating the whole matter as one of fact, concluded his judgment as follows: "I am quite clearly of opinion that "this collision could not have been caused by anything that "either vessel did or omitted to do. The cause of the collision "was the fact that they were both, in obedience to Admiralty "instructions, travelling at high speed on this very dark night "without any lights. The result is that neither ship is to "blame."

The fourth case is that of the *Owners of the Avance* v. *Owners of the Daphne* (2). It is a fog case, in which the *Avance*, a Danish vessel, collided with the French ship, *Daphne*. The *Avance*, which formed part of a convoy, was proceeding at about five and a half knots and sounding her whistle for fog. The *Daphne*, which was also sounding for fog, was not in convoy, and was making about three knots. The learned judge did not accept the evidence from the *Daphne* and found that she was to blame for not stopping and for starboarding. Two points were alleged against the *Avance*, but the question of speed is all that concerns us here. The learned judge deals with it as follows (3): "I think "it is probable that the *Avance* was going fully the six knots "which is mentioned. The master says his speed was five and "a half to six knots. I think she must have been going rather "more, having regard to the times given in the log. She might

(1) (1919) 1 Ll. L. Rep. 478.
(2) (1919) 1 Ll. L. Rep. 586.
(3) Ibid. 588.

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"not have run off her full speed and got down to five and a "half knots. I am advised, and I quite agree, that in ordinary "times and circumstances in the locality in question, near the "Lizard, in fog so dense that you can only see from 500 to "700 feet, five and a half knots would not be a moderate "speed; but the circumstances have to be considered, and "it has to be considered whether the special circumstances "of the case justified disobedience of the rule. The special "circumstances of the case are these. First of all, it is common "ground that the neighbourhood in which the ships were was "a dangerous neighbourhood as regards submarine attack. "The *Avance* was in convoy under British guidance. She "was not herself a British ship; she was a Danish ship, but ". . . . she had joined the convoy and the convoy was "under the command of a British naval officer. Now there "are two ways in which this matter can be considered. The "first is apart from the Defence of the Realm Regulations "and the second is in view of those Regulations. Apart from "the regulations which did not in terms apply to neutral "ships, in the circumstances, having regard to the known "risks of submarines and to the fact that the speed was being "set by the escorts and that the *Avance* was a member of "the convoy, the Elder Brethren are of opinion, and I agree, "that in these circumstances the speed cannot be regarded "as an immoderate speed. Or, if you like to take it as a "speed which could not be justified in ordinary times, it "was a speed which could be justified in the special circum-"stances of the case. But I think that the matter can be put "higher than that, having regard to the Defence of the Realm "Regulations, which required vessels to observe the special "instructions of the Admiralty authorities, even though they "were in conflict with the sea regulations. . . . . It has "been proved to my satisfaction that written or printed "instructions were handed to the master of the *Avance*, "which have been destroyed. I admitted the master's "evidence as to what those instructions contained. It was "that the convoy orders were that the ships were to keep in "position in convoy all the time and follow the orders of the

"leader as to helm action and speed. I do not know that "even without that evidence I should not be entitled to "draw the inference that ships in convoy were bound to "keep station and follow the orders of the leader as to helm "action and speed. The masters of the British ships were "bound to do so under the severe penalties prescribed by "the Defence of the Realm Regulations, and it would be "strange, that being so, if at the same time it should be held "to be negligence on the part of a master of a neutral vessel "if he did the very thing which the master of a British ship "was by law obliged to do. I decline to hold that it was "negligence. This vessel in maintaining speed was only doing "that which was being prescribed by the leading escort, and "doing that cannot be regarded as doing that which was "negligent or such as to amount to a breach of the sea "regulations. If you consider the matter from the point of "view of the sea regulations, she was doing something which "was justified by the special circumstances of the case. I "therefore find for the plaintiffs, and pronounce the *Daphne* "alone to blame." If it is to be considered that this case is in any way in conflict with the learned judge's ruling in *The Emlyn* (1), I, for my part, prefer this later opinion, though I am not sure that I would go the whole distance in regarding an order sanctified by a Defence of the Realm Regulation as overriding for all purposes and in any circumstances the sea rules.

Finally, the fifth of Hill J.'s decisions, "*Chatton*" v. "*Suram*" (2), was also a fog case. The report does not indicate that either of the vessels in collision was proceeding in convoy, and the case is only in point to the minor degree that both were proceeding under Admiralty instructions. On this topic the learned judge uses the following language : " Neither of these "ships on hearing the other's whistle stopped her engines. "That is admitted, and for that, in my view, there is no "excuse. The Regulations for Preventing Collisions at Sea "required it, and it has not been suggested (or if it has been "suggested, I do not agree) that there is anything in the

(1) [1918] P. 67. (2) (1920) 4 Ll. L. Rep. 111, 112.

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"Admiralty instructions which prohibited adherence to that "rule. Nor has there been proved any such immediate "apprehension of submarines to constitute a special circum- "stance such as to justify a departure from observance of "the rule. Therefore each is to blame on her own case for "not stopping, and thereafter navigating with caution." Later the judgment continues in these terms: "What I "blame them for in respect of their engines is that they did "not at once stop and thereafter navigate with caution. . . . . "If the Regulations for Preventing Collisions at Sea are not "obeyed, I can see no justification for the disobedience in "the Admiralty instruction, reading: 'During fog, when in "'areas in which submarines or raiders may be met, vessels "'are not to ease down when out of the usual track of "'shipping, and are not to sound their syrens or whistles "'unless absolutely necessary.' It is true that the Irish "Sea was an area in which submarines were to be met at "the time, but it was equally not out of the usual track of "shipping. I am only repeating what I have said in previous "cases when I say that, in my view, to justify disobedience "of a rule, the Admiralty instruction must be inconsistent with "it and overriding. The Admiralty instruction here shows "not that the rule was inapplicable, but that it was applicable "to the ships in question in the locality."

Collecting the learned judge's views from these decisions they would appear to be—(*a*) that, where a vessel is acting under the orders of a duly constituted authority it is not to be held in fault for a breach of the collision regulations occasioned by obedience to orders properly given; (*b*) if it be necessary to find sanction for this ruling outside of Admiralty orders or the authority of the Defence of the Realm Regulations, it is to be found in the wording of art. 27 of the collision regulations by virtue of the words "any special "circumstances which may render departure from the above "rules necessary in order to avoid immediate danger." So far as I have been able to discover this is where the matter rested at the conclusion of the last war and of the litigation immediately arising therefrom.

Turning now to the source and scope of convoy orders under which the *Vernon City* was proceeding, the legal situation of a vessel in convoy seems to me to be more clearly defined in present circumstances than in the last war. By the courtesy of the Treasury Solicitor who has furnished me with copies of all the relevant orders, I have been able to gain a view of the whole chain of authority on which these convoy orders depend. At the outset is the Emergency Powers (Defence) Act, 1939. By s. 1, sub-s. 4, of this Act, it is provided that: "A Defence Regulation, and any order, "rule or byelaw duly made in pursuance of such a regulation, "shall have effect notwithstanding anything inconsistent "therewith contained in any enactment other than this Act "or in any instrument having effect by virtue of any enactment "other than this Act." It is perhaps also worthy of remark that in the preamble to this statute it is described as "An "Act to confer on His Majesty certain powers which it is "expedient that His Majesty should be enabled to exercise "in the present emergency." Next, in the Defence (General) Regulations, 1939, made under this Act, there are contained in Part III. (Ships and Aircraft) the following provisions: "43. General control of navigation. (1.) The Admiralty "may by order make provision as to the places in or to "which vessels may be or go, and generally for regulating "the movements, navigation, pilotage, anchorage, mooring, "berthing and lighting of vessels (and such order may make "provision for such incidental and supplementary matters "as appear to the Admiralty to be necessary or expedient), "and any order made under this regulation is hereafter in "these regulations referred to as 'a navigation order.' (2.) If, "in the case of any vessel, a navigation order is contravened "or not complied with, the master of the vessel shall be guilty "of an offence against this regulation."

Pausing here to note the joint effect of the statute and the regulations made thereunder, it will be observed that a branch of the executive, namely, the Admiralty, is clothed with the special power to make "navigation orders" to regulate the movements and navigation of vessels notwithstanding anything

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inconsistent therewith contained in any enactment outside the Emergency Powers (Defence) Act, 1939. Moreover, obedience to these "navigation orders" is enjoined on all vessels which come within their ambit under penalty of an offence. Clothed with these powers the Admiralty, as early as August 26, 1939, made a navigation order known as Navigation Order No. 1, 1939, in the following terms: "1. British merchant vessels at all times and Dominion "vessels when in British territorial waters shall comply with "any sailing or route-ing instructions which may from time "to time be issued to them by the Admiralty or any person "authorized by the Admiralty to act under this order." The persons "authorized by the Admiralty" to act under this order are the naval control officers who are in turn empowered to delegate their authority over convoys to the commodores of the convoys. The masters of individual vessels sailing in convoy are apprised of this delegation of authority by sailing orders which contain (inter alia) the following general injunctions: "Sailing Orders for Ocean Convoy. 1. Being ready "in all respects, convoy will proceed to sea in accordance "with these instructions. Thereafter ships are to obey the "orders of the commodore of the convoy. 2. The master is "responsible for the safe navigation of his ship. He is also "responsible that pilots, officers on watch and engineer officers "are acquainted with these instructions in so far as they affect "them, and that they are given the necessary authority to "carry them out. 3. These orders, in the absence of instructions "to the contrary, are to be returned to the naval control "officer on arrival at the ship's destination, or to the British "consular shipping adviser in a neutral port, if of British "nationality." Accordingly, it appears to me that convoy orders, whether proceeding from naval control officers or from individual commodores, so far from being bare executive commands are in truth orders clothed with complete legislative authority empowering a particular branch of the executive to override in the matters here under consideration any previous enactments of the legislature to the contrary. If that view be correct, it would seem to follow that convoy

orders which run counter to the collision regulations are not executive commands which are contrary to the existing law, but are paramount orders which the convoy commodores are legally entitled to give notwithstanding the law and which individual ships in the convoy are legally bound to obey.

The Regulations for Preventing Collisions at Sea at present in force were made by the King in Council on October 13, 1910. They rest on statutory authority derived from s. 418 of the Merchant Shipping Act, 1894. They do not apply to ships belonging to His Majesty because these are governed by King's Regulations, but they do apply to government ships when registered as British ships, and they have been adopted in identical form by at least thirty other Sovereign States. The British Admiralty Court has always insisted upon the special sanctity of these statutory regulations, and, so far as my own personal conviction is of any value, I can imagine nothing worse for the cause of safety of life and property at sea than the introduction of any doubt concerning the universal application of these rules in all circumstances where they were intended to be and could properly be applied. I am, accordingly, glad to feel convinced that Parliament has really intended and actually authorized the Admiralty to issue orders which should override these regulations for the paramount purpose of the safety of the State, before myself reaching the conclusion in any particular case that convoy orders should take pride of place above the regulations.

In stating this conviction I am bound, however, to point out that just as the Admiralty Navigation Order No. 1 applies only to "British merchant vessels at all times and Dominion "vessels when in British territorial waters," so also this decision only covers and is applicable to those two classes of vessels. In saying this, I do not mean to suggest that, if the conclusion which I have reached is correct, it would not be held to apply equally to any neutral vessel sailing in a British convoy. Speaking for myself, I find it difficult to imagine that any court would hold otherwise than that neutral vessels sailing in British convoys are subject to the same rules and liabilities and also obtain the same legal advantages

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as British-owned vessels in the same convoy. Since, however, both the vessels concerned in the present case are British-owned, there is no obligation to discuss here the wider question which may arise when a vessel in convoy under British orders is found in collision with a neutral vessel outside the convoy. It will, of course, be patent to anyone who may be called on to consider this broader issue that, if the view expressed by Hill J. concerning the effect of the wide language of art. 27 of the collision regulations be accepted, a simple solution of this wider question is thereby presented. I yield to none in the depth of my respect for all the considered opinions of that learned judge. In this instance, however, for the reasons which I have pointed out above, I do not think that it would be correct to treat his utterances on this subject as having crystallized into a clear and final view. A factor in the consideration of such a question would be the method whereby members of foreign States have by agreement submitted to the collision regulations, and pro tanto might be said to have been promised the benefit thereof under s. 424 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). It is possible, of course, that this class of obligation might more properly form matter for an ex gratia payment by the Crown than for a judgment in a court of law, but, for my own part, I feel a difficulty at present, without having heard argument on the subject, in accepting the words "any special circumstances" in art. 27 as including matters so unforeseen and unforeseeable at the time when the articles were drafted and agreed as sailing in convoy and orders consequent thereupon.

Returning now to the facts of this particular case, the view which I have expressed here as to the law clears the *Vernon City* completely in the major matter of offending alleged against her. If those in charge of the convoy had a perfect right to order the convoy to proceed at seven knots in spite of the weather, and the *Vernon City* had a duty and a paramount duty to obey the convoy orders, it is obvious that she cannot be held guilty of negligence in obeying the order. The handling of the vessel when and after the whistle of the *Lairdscastle* was first heard falls into a somewhat different

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category. There was no convoy order to the effect that she was not to stop on hearing a whistle forward of her beam, and she is also open to criticism in not having stopped her engines at the moment when she first sighted the masthead light of the *Lairdscastle*. These are matters which fall to be decided in relation to the particular circumstances of each individual case. It is certainly not my desire, nor my intention, to lay down any principle by which vessels in convoy could be said to be excused from any obligation under the sea rules which they could properly fulfil. Convoy or no convoy, if a vessel navigating in fog could stop her engines without danger to the other vessels in the convoy on hearing a whistle forward of her beam—for example, if she were the last in the line of a convoy column and felt reasonably sure that none of her consorts were out of position —I should require strong evidence of special circumstances or special danger to exonerate her from non-observance of her duty under the rules. In the present instance, however, we have the case of a vessel leading her line after a long period of fog in which the vessels following, and even the vessels in neighbouring columns, might well have become displaced.

I have, accordingly, come to the conclusion, with the assistance and concurrence of my assessor, that it was not negligence on the part of the *Vernon City* in these particular circumstances not to stop her engines. It might have been better if she had done so, but the subsequent collision with the *Tacoma Star* is eloquent testimony of the danger surrounding the *Vernon City* and of the imminent risk of collision with her consorts consequent on taking steps to avoid a vessel outside the convoy. Similar considerations apply as regards stopping on seeing the white light of the *Lairdscastle*. In the time available between seeing the white light and the moment when the engines of the *Vernon City* were in fact stopped—a very few seconds as I see it—the *Vernon City* would have no opportunity of judging at all exactly how the *Lairdscastle* was heading, and when the master had gone so far it was perhaps better to wait the few seconds which would suffice to give a clear indication of the heading, and thus gain the

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information which could enable the best possible last minute action to be adopted, rather than take action on imperfect knowledge which might turn out to be harmful rather than helpful. In any case, the time in fact was so short that neither my assessor nor I feel satisfied that its utilisation one way or the other could have any bearing on the collision.

For these reasons I am of the opinion that neither of these vessels is to blame.

Solicitors for the plaintiffs: *Thomas Cooper & Co., for Batesons & Co., Liverpool.*

Solicitors for the defendants: *Constant & Constant, for Gilbert Robertson & Co., Cardiff.*

E. C. M. T.

1941

July 31.

MONCKTON *v.* MONCKTON.

Divorce—Desertion—Mental illness—Respondent a "temporary" and "voluntary patient"—Capacity to intend to desert—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 57), *s.* 2 (*b*).

Where the respondent to a petition for divorce on the ground of desertion is a temporary or voluntary patient within the meaning of the Mental Treatment Act, 1930 (20 Geo. 5, c. 23), it is a question of fact to be decided on the evidence whether or not he or she is capable of the intention to desert, or to continue to desert, the other party to the marriage.

Williams v. *Williams* [1939] P. 365, and *Rushbrook* v. *Rushbrook* [1940] P. 24, distinguished.

Undefended petition for divorce on the ground of desertion.

On August 31, 1932, the petitioner, Captain Frederick Hardy Monckton, R.E., was married at St. Matthew's Church, Croydon, to Cissie Wood Hay. After the marriage the parties lived in a house belonging to the wife. On December 23, 1937, after a quarrel, the wife asked the husband to "clear out" and take all his kit with him, and the husband did so. On December 13, 1939, the wife was received into a mental hospital as a temporary patient under the Mental Treatment Act, 1930. On December 20 she was re-graded as a voluntary

patient and she remained at the hospital until January 22, 1940, when she was finally discharged. During December, 1939, she wrote penitent and affectionate letters to her husband, asking him to try to arrange a holiday for her when she was discharged from the hospital. The husband, who was then on active service, obtained leave and saw his wife. Her attitude was quarrelsome, her grievance being that he had not arranged her holiday, and, as the interview continued, she became more and more quarrelsome. She reverted to all the accusations of infidelity and so on which she had been making against her husband throughout the married life, and, finally, she said she never wanted to see him again. On January 9, 1940, the husband went to France on active service. When he returned he again tried to obtain a reconciliation, but his wife's attitude was unchanged. On March 8, 1941, the husband presented a petition for divorce alleging that his wife had deserted him without cause for a period of at least three years immediately preceding the presentation of the petition. The suit was undefended. At the hearing evidence de bene esse was given by the deputy medical superintendent at the hospital that the wife's general attitude to her husband was one of deep-seated and hopeless aversion, and that throughout her stay at the hospital she was capable of forming an opinion whether or not she would return to live with him.

His Lordship required argument on the point whether or not the case was covered by the decision of the Court of Appeal in *Williams* v. *Williams* (1), wherein it was decided that a person who had been certified insane was incapable of an intention to desert.

B. M. Goodman for petitioner. This case is distinguishable from *Williams* v. *Williams* (1), in which the Court of Appeal was considering the capacity of a certified lunatic, and *Bennett* v. *Bennett* (2) where Bucknill J. gave a decision to the same effect with regard to a certified patient. In *Rushbrook* v. *Rushbrook* (3) Langton J. followed *Williams* v. *Williams* (1),

(1) [1939] P. 365.
(2) [1939] P. 274.
(3) [1940] P. 24.

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but a temporary or voluntary patient under the Mental Treatment Act, 1930, is in an entirely different position. The intention of the legislature in passing the Act of 1930 was to save such persons from the stigma of lunacy. Even a lunatic can have testamentary capacity during a lucid interval, and similarly it is a question of fact in each case whether a temporary or voluntary patient can form the intention to desert or to continue to desert.

HENN COLLINS J. [stated the facts, found that on December 23, 1937, the wife deserted the husband, and continued:] If I might regard the wife as being normal during her stay in the hospital, I should not have the least hesitation in saying that for the three years preceding the presentation of the petition she had deserted her husband, but I have to take account of the period between December 13, 1939, and January 22, 1940, for one week of which she was a temporary patient in the hospital.

Sect. 5, sub-s. 1, of the Mental Treatment Act, 1930, which deals with temporary patients, provides that: "a person "who is suffering from mental illness and is likely to benefit "by temporary treatment but is for the time being incapable "of expressing himself as willing or unwilling to receive such "treatment may, on a written application duly made in "accordance with the provisions of this section but without "a reception order, be received as a temporary patient for "the purpose of treatment." That section involves, in a sense, a definition of the mental disqualifications which entitle a person to temporary treatment, and it is said that it contemplates a wholly different state of mind from that which the Court of Appeal had before them in *Williams* v. *Williams* (1), where the respondent had been certified as insane. In that case the Court of Appeal, by a majority (MacKinnon L.J. giving reasons for dissent, but not dissenting), held that an intention to desert must be proved or imputed throughout the whole period of three years immediately preceding the petition and that, in the case of a certified person, no such inference or

(1) [1939] P. 365.

imputation could be drawn because (in the words of the Master of the Rolls) "there is, generally speaking, no capacity "to have the animus necessary to take such a step, or to give "to it the quality of volition required to produce a legal "result." Further light has been thrown on the matter by the judgment of Langton J. in *Rushbrook* v. *Rushbrook* (1), where it was sought to say that evidence of the actual state of mind of a certified lunatic could be tendered to show that he had lucid intervals, or that during the whole of the period of the lunacy he was capable of forming a judgment or having the animus to which the Master of the Rolls had referred in *Williams* v. *Williams* (2), but Langton J. held that that was not the proper reading of the decision of the Court of Appeal in *Williams* v. *Williams* (2), which allowed no such question of fact to be entered into. It is, therefore, clear to me, on authority, that I cannot consider the medical evidence of the state of the wife's mind in the present case, unless there is a distinction between a temporary or voluntary patient under the Act of 1930 and a certified patient.

Is there a distinction in fact? I think there is. All I can learn (without the aid of medical evidence) from the fact that the wife was received into the hospital as a temporary patient is that she was suffering from mental illness and was incapable of deciding of her own mind whether or not she ought to enter the hospital. I have no adverse evidence of her state of mind except to that extent. Am I to infer that she had no will in the other matters of life and was incapable of forming an opinion or of having an intention? I do not feel constrained to say that that is the proper view, and I think that this case is distinguishable, on the facts, from *Williams* v. *Williams* (2).

I also have the medical evidence, which I could not consider but for the distinction which I have drawn between the facts in this case and those in *Williams* v. *Williams* (2) and *Rushbrook* v. *Rushbrook* (1), and that evidence is that the wife was, during all her sojourn in the hospital, capable of forming an opinion that she did not want to go back to her husband.

(1) [1940] P. 24. (2) [1939] P. 365.

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MONCKTON v. MONCKTON.

Henn Collins J.

For the reasons which I have given I think that that question of fact is open to me, and I find that during the whole of that period she had a mind sufficient to form an intention to return to her husband, or not to do so, as the case might be.

I am deciding this case on its own facts and perhaps I ought to say no more, but I should like to add that (untutored by higher authority) my own inclination would be to give two meanings to the word "desertion," one being the intentional disruption of the matrimonial consortium against the will of the other spouse—the act of desertion—and the other the state of things which results from that wilful act—the continuance of the desertion. Intention is a necessary ingredient in the act of desertion, but no mere change of intention can put an end to the state of things which results from the act. That can be ended only, as the Master of the Rolls pointed out, in *Williams* v. *Williams* (1), by supervening consensus, as by a separation agreement bona fide made, by the return of the deserting spouse, or by an offer made in good faith to re-establish the matrimonial life. Without one or other of these acts the best of intentions goes for nothing. No doubt, in the absence of consensus, of return, or of an offer to return, the intention to continue the desertion is imputed to the deserter, but this is only another way of saying that the burden is on the deserter to prove that the state of things which resulted from his or her act of desertion has come to an end, and that no mere change of mind is enough. If the facts were framed in, as it were, a pleading, to ascertain where the burden of proof lay, it would be found, after proof by the petitioner of the original act of desertion, to lie on the respondent to show that it had been brought to an end in one of those three ways. It would be useless for the respondent to aver a change of intention without any overt act, and still more so, I should have thought, to aver a complete absence of intention one way or other, and, if the respondent cannot, for any reason, make any of the material averments, the petitioner succeeds. Is the deserting spouse to be relieved of that burden of proof on it being shown that he or she was for

(1) [1939] P. 365.

moments, months, or, it may be, years, incapable of forming an opinion by reason of insanity? As I say, my own answer would have been: "No." Insanity would deprive the defaulter temporarily or for a longer period of the locus pœnitentiæ which was open to him or her, but it would not affect the matter otherwise. This, however, is not in accordance with the decision of the Court of Appeal in *Williams* v. *Williams* (1).

Decree nisi.

Solicitors: *Zeffertt, Heard & Morley Lawson.*

(1) [1939] P. 365.

W. L.

IN THE ESTATE OF HANLEY.

C. A.

1941

Oct. 20.

Probate — Will — Partial intestacy—Testatrix's death without kin — Residuary estate undisposed of—Bona vacantia—Crown's claim to grant of administration with will annexed—Need to cite legatees—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23) *s.* 46, *sub-s.* 1 *—Principal Probate Registry Rules (Non-Contentious Business), r.* 119.

When a testator dies on or after January 1, 1926, leaving a will whereby no executor is appointed and the residue is not wholly disposed of, and the Crown, in the absence of known kin of the testator, is entitled to the ultimate residue as bona vacantia, the Crown is not entitled to a grant of administration with will annexed in priority to or without being required to cite the persons referred to in headings 6 and 7 of r. 119 of the Principal Probate Registry Rules (Non-Contentious Business).

For this purpose the Crown is not entitled to priority as being a person "entitled upon an intestacy" within heading 4, but comes under the last heading, 8, where it is specifically mentioned.

APPEAL from Lord Merriman P.

Maria Hanley (otherwise Mary Hanly), who was a spinster without known kin, died on February 14, 1940, after having made a will of the same date by which she bequeathed certain pecuniary legacies but did not appoint any executor or dispose of the residue of her estate. In these circumstances the Crown claimed the residuary estate as bona vacantia and the Treasury Solicitor applied to have a draft citation settled by

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which it was sought to obtain a grant of administration with the will annexed on citing only the kin (if any) of the testatrix. On March 28, 1941, the registrar refused to settle the draft citation, holding that the Crown was not entitled to a grant in priority to legatees and, that on the failure of the legatees to take the grant, the legatees must be cited in addition to the next of kin. Later, the Treasury Solicitor took out a summons to have the registrar's decision reversed and an order made that the citation be allowed to issue forthwith, and he asked for a direction of the court that in all cases where a testator had died on or after January 1, 1926, leaving a will whereby no executor had been appointed or where no executor was able or willing to act, and where the residue had not been wholly disposed of and the Crown in the absence of kin of the testator was beneficially entitled to the ultimate residue, the Treasury Solicitor, as nominee of His Majesty, was entitled under heading 4 of r. 119 of the Principal Probate Registry Rules (Non-Contentious Business) (1), or otherwise in law, to a grant of letters of administration with the will annexed in priority to and without being required to cite the persons referred to in headings 6 and 7 of the rule.

The President said that the question was whether, on an application by the Crown for a grant under r. 119, the legatees must be cited. Recently the practice had been to make a grant to the Crown only on a citation of persons, if any, having interests specified in the first seven headings and Hodson J.

(1) Principal Probate Registry Rules (Non-Contentious Business), r. 119: "Where the deceased died "on or after the 1st January, "1926, leaving a will, the prior- "ity of right to a grant of probate "or administration with will an- "nexed shall be as follows :—

"1. Executors.

"2. Residuary legatees or "devisees in trust.

"3. Residuary legatees or de- "visees for life.

"4. Ultimate residuary legatees "or devisees, or, where the "residue is not wholly disposed of, "the persons entitled upon an "intestacy.

"5. The legal personal repre- "sentatives of persons indicated "in 4.

"6. Legatees or devisees, or "creditors.

"7. Contingent residuary lega- "tees or devisees, or contingent "legatees or devisees, or persons "having no interest in the estate, "who would have been entitled "to a grant had the deceased died "wholly intestate.

"8. The Crown."

had adopted that view. He would follow his ruling for the sake of uniformity, unless he was satisfied that it was wrong, but in fact he agreed with it.

The Treasury Solicitor appealed.

Sir Donald Somervell A.-G. and *Victor Russell* for the Treasury Solicitor. By s. 46, sub-s. 1, of the Administration of Estates Act, 1925, the residuary estate of an intestate is to be distributed as provided in the sub-section and the final and sixth heading is " In default of any person taking an absolute "interest under the foregoing provisions, the residuary estate "of the intestate shall belong to the Crown or to the Duchy of "Lancaster or to the Duke of Cornwall for the time being, "as the case may be, as bona vacantia and in lieu of any right "of escheat." Sect. 55 (vi.) provides that "'intestate' includes "a person who leaves a will, but dies intestate as to some "beneficial interest in his real or personal estate." The Crown is, therefore, entitled in this case to the residue on an intestacy and comes within heading 4 of r. 119. The need to cite the legatees and creditors would only arise if the Crown was entitled under heading 8, which would apply if property were given for a charitable purpose, as, for example, for the poor of London, and the Crown alone could enforce the charitable bequest, or in a case under the Supreme Court of Judicature Act, 1925, s. 162, sub-s. 1, where it appeared right to appoint as administrator someone other than the person primarily entitled and the Crown applied for a grant. It would be very difficult to say that where the Crown is expressly made residuary legatee it could not apply under heading 4. Further, it would seem contrary to what was right for a person given a very small legacy to be entitled to prove without citing the Crown. The fact that the Crown has taken the residuary estate as bona vacantia can make no difference because s. 46, sub-s. 1, of the Administration of Estates Act, 1925, recognizes that the Crown is then a person " entitled upon an intestacy."

GODDARD L.J. By this appeal the Crown, which claims the residue of the estate of the testatrix as bona vacantia, raises

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Goddard L.J.

the question whether it should take its place in the fourth heading of persons entitled to a grant of administration under r. 119 of the Principal Probate Registry Rules (Non-Contentious Business), or whether, as the rule states in terms, it must take the lowest place. The rule specifies the priority of right to a grant of administration, and if a person who comes under a lower heading wishes to apply where there are persons of a higher category in existence, the practice requires that the persons in the higher category should be cited. The Attorney-General argues that, as the Crown becomes entitled to the residue which is left by this testatrix, the Crown can take its place as one of the classes in heading 4 of the rule, but both the President and Hodson J. have held that, as the Crown is specifically mentioned in the rule and comes at the end of the categories specified, it must remain in that position, with the result that it will have to cite the creditors, devisees or legatees before it can obtain a grant.

In my view this construction of the rule is correct. If the will had left the money direct to the Crown, as some testators have been known to do, the Crown would obviously have come in under the fourth heading as the ultimate residuary legatee of the testator but, if the Crown takes the estate by virtue of its right to bona vacantia, I do not think it can be said that it is a person entitled upon an intestacy within the meaning of the rule. The Administration of Estates Act, 1925, s. 46, sub-s. 1 (vi.), provides in express terms that the residuary estate of a person dying in the circumstances therein specified goes to the Crown as bona vacantia, and that, I think, must be the matter that the framers of the rule had in mind when they placed the Crown at the bottom of the list.

In these circumstances, I am of opinion that the decision of the learned President was right, and this appeal must be dismissed.

DU PARCQ L.J. I agree.

Solicitor: *Treasury Solicitor.*

H. C. G.

Distinguished. DANCER *v.* DANCER.
[1948] 2 All E.R. 731.

CHIPCHASE *v.* CHIPCHASE, OTHERWISE LEETCH, OTHERWISE MATTHEWS.

1941
June 12.

Divorce—Nullity—Undue publication of banns—Marriage Act, 1823 (4 *Geo.* 4, *c.* 76), *s.* 22.

The respondent, not having seen or heard of her husband since 1916, went through a form of marriage with the petitioner in 1928. She had been known in the district by her maiden name for some years, and she had the banns called in that, instead of her married name, the petitioner being aware of the first marriage and of the respondent's legal name. On a petition by the petitioner for nullity of marriage on the ground of undue publication of banns, it was found that the respondent had the banns called in her maiden name, not because she was known by that name and to give any other would have been misleading, but because it served to conceal the fact that she was already married :—

Held, that there had not been "due publication of banns" within s. 22 of the Marriage Act, 1823, and that the "marriage" of the petitioner and the respondent was, therefore, null and void.

PETITION for nullity of marriage.

In 1915 the respondent, whose maiden name was Matthews, married a man named Leetch. In 1916 they separated and the respondent neither saw nor heard anything of her husband between that date and August 11, 1928, when she went through a form of marriage with the petitioner at St. John's parish church, Fitzroy Square, London. The banns for that wedding were, to the knowledge of both the petitioner and the respondent, called, not in the respondent's married name of Leetch, but in her maiden name, by which she had been known in the neighbourhood for some years.

The petitioner asked for a decree of nullity on the ground that there had not been "due publication of banns" within s. 22 of the Marriage Act, 1823 (1), by reason of the respondent giving her maiden name instead of her married name. The respondent, who by her answer denied the charge, admitted that the banns had been called in her maiden name instead of her legal name, but she pleaded that she had no intention to

(1) By Marriage Act, 1823, s. 22, if any persons "shall "knowingly and wilfully inter- "marry without due publication "of banns or licence . . . . the "marriages of such persons shall "be null and void to all intents "and purposes whatsoever."

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deceive anybody and that her real name was known to the petitioner.

C. O. Herd for the petitioner. There has been a breach of s. 22 of the Marriage Act, 1823, and the petitioner is entitled to a decree. If, in having banns called, a person tells a deliberate lie as to his status, concealing and cloaking his identity, that is not a due publication under the Marriage Act, 1823. *Wright* v. *Elwood* (1) is very near the present case having regard to the submission of *Addams* and the judgment of Dr. Lushington. In *Wiltshire* v. *Prince* (2) it was held that the banns had been published in a manner calculated to conceal the identity of the parties and the marriage was pronounced to be null and void. In the present case both parties were cognizant of the fraud and intended to conceal the fact that the respondent was married. The prayer book provides that the officiating priest shall say: "If any of you know cause, or just impediment, why these "two persons should not be joined together in holy matrimony "ye are to declare it." If a married woman has passed herself off for years as a spinster and her name is called in church in that name, no one can raise any just impediment or know of any cause against the marriage. The public have an important right in this matter, the right to inform, and what has occurred here is a fraud not only on the Church and the clergy, but also against public policy.

Garland (for *H. J. Phillimore*, on war service) for the respondent. The respondent had reacquired her maiden name by repute, and it was, therefore, her legal name. Consequently, there was no undue publication by her using her maiden name for the banns. Nor is there any proof of intent to deceive. It would be extending the range of the authorities to annul this marriage.

HENN COLLINS J. This case has had a curious history. The present phase of it is a suit for nullity by the petitioner on

(1) (1837) 1 Curt. 49, 51.
(2) (1830) 3 Hagg. Ecc. 332, 334.

the ground that the respondent, with whom he went through a ceremony of marriage on August 11, 1928, was then a married woman, and it was no marriage, because to the knowledge of both the parties, the respondent was married in a name which was not her lawful name. The petitioner does not pretend that he was in any sense deceived. If fraud there was, he was a party to it, so that when, in answer to a summons for maintenance against him which the respondent took out before magistrates in 1938, he put forward as a defence that which he now puts forward as a cause of suit, one does not feel that his case has any merits. I have, however, solely to consider a question of law as it arises on the facts before me.

I think I ought, first, to refer to the earlier history of the case, because the application to the magistrates by the respondent resulted in the case coming before a Divisional Court of which I was a member, and the judgment of the court throws light on the question which I have now to investigate as a question of fact and on the law which I have to apply to the facts when I have found them. The learned President, in dealing in his judgment in that appeal (1) with the construction of s. 22 of the Marriage Act, 1823, said: "The same "appears even more clearly in the judgment of Sir Jenner "Fust in *Orme* v. *Holloway* (2), where he says the construction "of this Act is that, in order to set aside a marriage on the "ground of undue publication of banns, it is necessary for both "the parties to be cognizant of the fraud; it is necessary first "to prove that there has been fraud, and, secondly, that both "parties were cognizant of the fraud and knowingly and wilfully "entering into the marriage without due publication of banns." The case was sent back to the magistrates because the court was of opinion that they had not directed their minds to one possible aspect of the facts, namely, whether the respondent had given her maiden name because she was known among her associates by that name, or whether it was done to deceive or mislead any person or persons into thinking that she was not a married woman.

(1) [1939] P. 391, 397.

(2) (1847) 5 Notes of Cas. 267.

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Henn Collins J.

Unfortunately that matter never came before the magistrates, the summons not being pursued as the petitioner had filed the present petition, and it comes before me for decision as a question of fact. I have to ask myself which of the two versions of the facts given by the parties to this suit, in so far as they differ, I accept. I find that the respondent gave her maiden name not because she was known by that name and to give any other would have been misleading, but because it served to conceal, or, at any rate, not to emphasize, the fact that she was already married.

The judgment in the Divisional Court (1) indicates that one of the matters which the magistrates were to consider was whether the intention of the wife, in giving her maiden name, was to conceal her identity, and, if I address the same question to myself with regard to the facts I have found, I have first to ascertain what exactly is meant by concealing her identity. She did not conceal her identity from the persons in her parish who knew her by that name, but I think that one of the purposes of the Marriage Act, 1823, would be defeated if it was open to a person to have banns called in a name by which he was known in the parish when the use of his legal name might lead to persons making uncomfortable inquiries. In my view, that is one of the very things against which the Act of Parliament was directed, and, although I do not feel that there is any moral obliquity in this case, there has been an infraction of the statute and this marriage was not a marriage in law. It, therefore, only remains for me to pronounce a decree of nullity.

Decree of nullity.

Solicitors for petitioner : *Large & Co.*

Solicitors for respondent : *Wingfields, Halse & Trustram.*

(1) [1939] P. 391.

W. L.

BISHOP *v.* BISHOP.

1941
Sept. 2.

Divorce — Practice — Pleading — Petition — Resumption of cohabitation — Matrimonial Causes Rules, 1937, *r.* 4, *sub-r.* 1 (*f*).

The effect of r. 4, sub-r. 1 (*f*), of the Matrimonial Causes Rules, 1937, where an order has been made in previous proceedings with reference to a marriage, is that the petition in a matrimonial cause relating to that marriage must state, aye or no, whether there has been any resumption by the parties of cohabitation since the making of the order, but there is no need for that averment to be made in the same paragraph of the petition as that in which the previous proceedings are pleaded.

SUMMONS adjourned into court.

The registrar had declined to give a certificate for setting down for trial a petition for divorce based on charges of cruelty, the ground for his decision being that there was an insufficient plea as to the resumption or otherwise of cohabitation. The petition recited, in pursuance of r. 4, sub-r. 1 (*f*), of the Matrimonial Causes Rules, 1937 (1), the fact of a separation order having been granted to the petitioner by a court of summary jurisdiction and of its subsequent discharge by that court, but the paragraph setting out those facts did not allege that there either had been or had not been any resumption of cohabitation since the making of the order. In a later paragraph which contained substantive allegations the petition stated that the parties had not resumed cohabitation. The matter came before the judge on a summons for a direction that the certificate for setting down the case for trial should issue.

William Latey for the petitioner. Although the petition contained a plea of non-resumption of cohabitation there was

(1) Rule 4, sub-r. 1 (*f*), of the Matrimonial Causes Rules, 1937, provides that the petition in a matrimonial cause shall state: "Whether there have been in the "High Court or a court of summary jurisdiction any, and, if "so, what previous proceedings "with reference to the marriage "by or on behalf of either of the "parties to the marriage, the date "and effect of any decree or order "made in such proceedings, and "whether there has been any "resumption of cohabitation since "the making thereof."

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no obligation to plead it under the rule when in fact there had been no resumption. The case is different from one where desertion is alleged, for there it would not only be relevant but necessary to plead non-resumption in view of the fact that, if there had been resumption of cohabitation within the three years immediately preceding the date of the petition, an allegation of desertion could not succeed, and a separation order would also bar desertion if not revoked by resumption of cohabitation. A positive duty to plead in a certain manner laid down by statute or rule does not involve a duty to deny it. A negative plea is not required in any form of pleading. If it were necessary to plead the negative, it might have been so provided in r. 4, sub-r. 1 (*f*), by using the words "whether or not."

LANGTON J. This summons raises a point of some importance to practitioners as to the interpretation of r. 4, sub-r. 1 (*f*), of the Matrimonial Causes Rules, 1937. The registrar refused the certificate on the ground that the sub-rule made it necessary for the pleader to state whether or not there had been any resumption of cohabitation since the order made in a court of summary jurisdiction. A statement as to non-resumption was in fact contained in a later paragraph of the petition. There is no rule which makes it necessary for the averment to be made in the same paragraph as that in which the previous proceedings are pleaded. Therefore, an order for the certificate should be made.

With regard to the interpretation of r. 4, sub-r. 1 (*f*), there are apparently two schools of thought. One school includes certain of the registrars who take the view that the word "whether" in the last sentence of the rule means "whether "or not," that is to say that it is necessary to plead whether there has been any or whether there has been no resumption of cohabitation. According to the other school of thought, "whether" merely means "if."

The word must be taken in the context in which it is found. The rule lays down that certain facts must be stated in a petition, as, for instance, in r. 4, sub-r. 1 (*a*)—"the place

"and date of the marriage and the name and status of the "wife before the marriage." In r. 4, sub-r. 1 (*c*), there is an admirable instance of the respective significance of the words "whether" and "if" (1). To my mind, "whether" here means "aye or no," and "if" has a different meaning confined to an affirmative condition only, and that is why the word "whether" is used in sub-rules 1 (*c*) and (*f*) in preference to the word "if." The rule, therefore, intends and directs that the pleader shall plead "aye or no" under rule 4, sub-r. 1 (*c*) and (*f*). It is, indeed, highly convenient that the court should know aye or no if there has been any resumption of cohabitation since a previous decree or order.

Solicitors for petitioner: *Huntley, Son & Phillips, for Winch & Winch, Chatham.*

Solicitors for respondent: *Stafford Clark & Co.*

(1) Rule 4, sub-r. 1 (*c*), of the Matrimonial Causes Rules, 1937, provides that the petition in a matrimonial cause shall state: "Whether there are living any "children of the marriage and, "if so, the names and dates of "birth or ages of such children "and, if it be the case, that the "paternity of any child of the "wife is disputed."

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1941
Nov. 25, 26.

Shipping—Damage at berth—Barges moored by wharfingers in safe position—Removal by other parties to part of berth which was unsafe—Duties and obligations of wharfingers.

The plaintiffs' barges were left properly moored in a safe berth alongside the second defendants' wharf to which they had come to discharge and load cargoes. During the night the ship of the first defendants arrived off the wharf, but, as the time at which she was due to arrive was not known, there was no one on the wharf to give her berthing directions. To enable the ship to get alongside the wharf, her crew, on the pilot's instructions, moved the barges further up the wharf where the ground, unknown to the pilot, but to the knowledge of the second defendants, was unfit for barges to ground on. When the second defendants' foreman arrived one of the barges was already aground, but the other was afloat. There were no lightermen on the wharf to move

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her and the foreman did not ask the ship's crew to do so. Bot the barges received damage :—

Held, that, in moving the barges, the first defendants committed a trespass, and that they were not entitled to assume that the whole frontage of the wharf was a safe berth for vessels to lie and take the ground ; that there was no continuing duty on the second defendants, who had left the barges safely moored, to warn the plaintiffs that the barges had been moved to an unsafe place, and that they were not guilty of a breach of duty in not taking any measures to move the barge which was still afloat from a berth in which they had not placed her ; and, therefore, that the first defendants were solely responsible for the damage.

ACTIONS of damage.

The plaintiffs were respectively the owners of the barge *Colne*, and the bailees of her cargo, and the owners of the barge *India*. The first defendants in each action were the owners of the steamship *Majfrid* and the second defendants were C. Shaw Lovell & Sons, Ld., the owners of Lovell's Wharf, Greenwich. On May 22, 1939, the *Colne* was brought alongside Lovell's Wharf to discharge a cargo of duckboards, and both she and the *India* were properly and securely moored. Early on May 23 the *Majfrid* arrived off the wharf to discharge cargo. She had come from Riga. The second defendants did not know the precise time at which she would arrive, and, consequently, their foreman was not there to receive her. The pilot of the *Majfrid* saw that he could not get his ship alongside the wharf while the barges were lying there, and he took it on himself to order the crew of the ship to move them some forty feet further up river. He then brought his ship into the berth and moored her alongside the wharf with her stern close to the forward end of the *Colne*. The result of moving the barges was that on the next low water the *Colne* took the ground, and, the berth in which she was lying being thoroughly bad, both she and the *India* were damaged. A pile pierced the bottom of the *Colne*, and the *India* suffered a general strain over a large part of her bottom. When the second defendants' employees were first apprized of the fact that the barges had been moved and the foreman had come on the scene, the *Colne* was then touching the ground. The *India* was afloat, but there were no lightermen there to shift the

barges, and nothing was done by the second defendants to move her.

Bateson for the plaintiffs. The barges were left in a safe position, but they were moved by the first defendants to a place where they were improperly moored and in consequence received damage. The plaintiffs make no charge against the second defendants, but if the first defendants establish negligence against the second defendants, the plaintiffs will rely on it.

Trapnell K.C. and *E. W. Brightman* for the first defendants. The pilot acted reasonably in ordering the barges to be moved. He had no knowledge that the place to which he moved the barges was unsafe. He was entitled to assume that the whole berth was fit for use unless some indication to the contrary was given. The second defendants had sufficient notice that the *Majfrid* was coming to the wharf and ought to have had someone there to receive her. They owed a duty to vessels invited to the wharf to warn them that part of the berth was unsafe. If the *Majfrid* had been a few feet longer than she was and had received damage there could have been no answer to a claim by the first defendants against the second defendants. Even assuming that the pilot ought not to have moved the barges, the damage sustained does not flow from the first defendants' act or default. When the second defendants' foreman arrived on the wharf in the morning, one, if not both, of the barges was still afloat, but he took no steps to move or re-moor them or to give any warning that they were in a dangerous position.

Sir Robert Aske K.C. and *Honeyman* for the second defendants. The proposition that wharfingers represent to vessels coming to their wharf that the whole berth is safe, is unsound. There was no invitation to the first defendants to berth their ship, or to remove the barges, and there was, therefore, no implied contract between the second defendants and the first defendants as to the condition of the berth at that spot : see observations of Branson J. and du Parcq L.J. in *Onesimus Dorey & Sons, Ld.* v. *Headleys Wharf, Ld. and Wm.*

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Ashby, Ld. (1). The principles laid down in *The Moorcock* (2) cannot be applied. Where the second defendants originally put the barges was perfectly safe, and the invitation and warranty as to the state of the berth only applied to that place. There was no continuing duty on the second defendants to warn or to move the barges from a berth in which they had not put them. In *The Baltic* (3), where a ship master had complained that a harbour master had not continued to stand by and warn him that his vessel had not sufficient list, Hill J. said that in his view it was " not the duty of harbour masters "to act as nurses to ships." The first defendants were wrong-doers. They had no right to move the barges, and they are liable for all the consequences of their doing so.

BUCKNILL J. This case has raised some interesting points of law, and I should have liked in some ways to have had time to put my judgment in a more ordered form, but the facts are not really in dispute and as I have no doubt whatever as to what the judgment should be, I will proceed to give it.

[His Lordship stated the facts and arguments, and continued:] As regards the first defendants, I am satisfied that they moored the barge *Colne* improperly. In my judgment she was improperly moored in two ways. First, sufficient slack was not taken in on the stern rope having regard to the fact that the barge was moved up some forty feet, and, secondly, the head ropes were too taut or too short. The result was that the *Colne*, as the tide ebbed, swung out her stern into the river, while her bows were held too tightly against the frontage of the wharf and eventually dropped down on a pile. Secondly, in my judgment, the pilot of the *Majfrid* had no right to move the barges, and in doing so he committed a trespass. What he ought to have done was either to anchor in the river off the wharf, or go to the buoys and get instructions from the second defendants. He moved these barges for his own purpose, or for that of his employers and their benefit, and he did so at his and their peril. He moved the barges to a

(1) (1938) 62 Ll. L. Rep. 186, 194; 64 Ll. L. Rep. 131, 134.
(2) (1888) 14 P. D. 64.
(3) (1929) 33 Ll. L. Rep. 62, 66.

thoroughly unsafe place. He did not know it was unsafe, but, as I say, he moved them at his peril.

Dealing with the first point which Mr. Trapnell made, in my judgment the pilot was not entitled to assume that the whole frontage of the wharf was a berth at which a vessel was invited to lie and take the ground. There was no such general invitation issued by the second defendants to the *Majfrid*. The invitation to the *Majfrid* was that she should come to the wharf and take the ground in the berth selected by them, and I know of no authority which says that one is entitled to assume that the ground alongside a wharf is prepared and suitable for vessels to lie and take the ground.

The second point is a little more difficult, namely, whether the damage to these barges flowed from the wrongful act of the first defendants. In my judgment, the damage did flow from their wrongful act. I am satisfied that on May 23, the second defendants could not have moved the *Colne*, which was aground. The *India* was not aground, and, if they had wished to do so, they could have asked the men in the *Majfrid* to have taken the *India* and put her on the port side of the ship. They did not do so, and they elected to put cargo in her.

So far, therefore, as the *Colne* is concerned, the second point which was taken by Mr. Trapnell certainly fails. As to the *India*, having regard to the fact that she could have been moved, I have to consider the more difficult point whether there was any duty on the part of the second defendants to move her from the dangerous position in which they knew she was. No authority has been cited to me which bears out the proposition of Mr. Trapnell that the second defendants had a continuing duty to warn the owners of the *India* at all times that she was not in a safe position. She was in a safe position when she lay at the wharf, having been placed there by the foreman, and Mr. Bateson has not argued that the second defendants committed a breach of duty in not moving the *India* from a position in which they had not placed her. In the circumstances I hold that they did not commit a breach of duty in failing to move her or not asking the men in the ship to move her. That being so, there must be judgment for

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the plaintiffs against the first defendants, but judgment in favour of the second defendants. The second defendants will get their costs from the plaintiffs who are entitled to recover those costs from the first defendants.

Judgment accordingly.

Solicitors for the plaintiffs: *J. A. & H. E. Farnfield.*

Solicitors for the first defendants: *Bentleys, Stokes & Lowless.*

Solicitors for the second defendants: *Constant & Constant.*

E. C. M. T.

WARE *v.* WARE.

1941
Nov. 7.

Divorce—Desertion—"Without cause"—Termination—Offer by deserting spouse—Device to defeat petition—Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2.

The principle that an offer to resume cohabitation by a deserting spouse made at any time during the three years immediately preceding the presentation of the petition, if refused by the deserted spouse, terminates the desertion, can only be applied if the court is satisfied that it is a genuine offer to resume cohabitation and to behave properly as a spouse and is not a mere device to interrupt the continuance of the statutory three years in order to defeat the petition.

Pratt v. *Pratt* [1939] A. C. 417 considered.

HUSBAND'S undefended petition for divorce.

On June 17, 1941, Leonard William Ware petitioned for a divorce from his wife, Rosabel Nora Mathilde Ware, on the ground that she had deserted him for three years immediately preceding the presentation of the petition. In March, 1938, the wife told the husband that she was in love with another man and wanted him to divorce her so that she could marry the other man. She then left her husband and never returned to him. On June 7, 1938, she wrote to him a letter expressing her appreciation of his wish to have her back, but making clear her decision not to return. On October 14, 1939, she wrote a further letter to the husband in which she said: "Darling "Leonard, the war has changed a lot of things. Couldn't "you let it wipe out the past, and consider the future together "again." The husband did not reply.

G. F. Stringer for the petitioner.

BUCKNILL J. The difficulty which has arisen in this case is due to the decision of the House of Lords in *Pratt* v. *Pratt* (1), which, in effect, was that if at any time during the three years preceding the presentation of the petition a deserting wife or husband makes a genuine offer to return to the other spouse and the other spouse refuses to accept that offer, the

(1) [1939] A. C. 417.

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desertion is terminated. It seems to me that that decision must not be used to give colour to a mere device to interrupt the running of the statutory three years, the phrase used by Lord Macmillan in his speech. A great injustice might be done to a spouse who had been deserted for nearly three years if, at the eleventh hour when he was about to file a petition, he could be defeated by the stratagem of the offending spouse offering to return, although not really contrite or anxious to resume married life. I think, therefore, that the principle laid down in *Pratt* v. *Pratt* (1) can only be applied if the court is satisfied that there is a genuine offer to resume cohabitation and to behave properly as husband or wife as the case may be. In this case I am not satisfied that there was any such offer. [His Lordship reviewed the evidence.] There will be a decree nisi.

Solicitors: *Hewitt, Woollacott and Chown.*

(1) [1939] A. C. 417.

W. L.

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Nov. 6, 18; *Dec.* 4.

THE GLENEARN (No. 2).

Prize—Cargo in British ship—Consignment to London and Hamburg—Voyage abandoned in London owing to imminence of war——Condemnation of parcels of Hamburg consignment—Compensation in lieu of freight on condemned parcels—Basis of compensation.

Before the outbreak of war a British steamship owned by the claimants loaded a mixed cargo at ports in the Far East for carriage to London and Hamburg. The bills of lading entitled the claimants to abandon the voyage on imminence of war, and provided that in such circumstances freight, if not prepaid, should be payable in proportion to the carriage. On the arrival of the ship in London towards the end of August, 1939, the claimants decided to discharge all the cargo and abandon the voyage to Hamburg. The claimants recovered the whole freight on the cargo with the exception of the freight on five parcels. The claim in respect of one of these stood over and another was withdrawn. The freight on the remaining three parcels which were consigned to Hamburg and had been condemned as prize, amounted to 150*l.* 1*s.* 9*d.* On a reference to assess the amount of compensation in lieu of freight to be paid by the Crown on

these three parcels the registrar reported that no compensation was due, because, by ending the voyage in London, the claimants had saved themselves the expense of taking the ship on to Hamburg, which would have greatly exceeded the amount of the freight on the parcels in question. On a motion in objection to the report :—

Held, reversing the decision of the registrar, that it was the freight itself on the individual consignments, and not any profit to be made out of the freight, which was the basis of compensation, and that profit and loss accounts were irrelevant, so that the claimants were entitled as compensation to 144*l.* 7*s.* 7*d.*, the amount of the freight calculated on the distance actually steamed, namely, 10801/11228ths of the full freight to Hamburg.

Principles laid down in *The Juno* [1916] P. 169 considered.

MOTION in objection to registrar's report.

The claimants, the owners of the British steamship *Glenearn*, moved in objection to the report of the registrar holding that nothing was due to them from the Crown as compensation in lieu of freight on some parcels of cargo consigned from Hongkong to Hamburg, which had been discharged in London and condemned as prize. The *Glenearn* was carrying a mixed cargo shipped at ports in China and Japan to, among other ports of destination, London and Hamburg. By cl. 5 of a typical bill of lading, the shipowners were entitled, if there were reasonable grounds for anticipating that the imminence of war threatened to impede the carriage, discharge or delivery of the cargo, to abandon the voyage or land or store the cargo at any port without liability for loss or damage, and anything done by reason of these provisions should be deemed to be within the contract voyage. Clause 27 provided that freight, if prepaid, was to be considered earned at the time of the receipt of the cargo for shipment and was not returnable. After stipulating for the payment of freight, not prepaid, on the date of arrival of the goods at the port of destination, the clause contained the following provision: "Where the carriage of the goods is abandoned and this "contract is determined short of destination, freight, if not "prepaid, shall be payable in proportion to the carriage." The ship reached London in the ordinary course of her voyage on August 23, 1939. In accordance with the terms of the

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bill of lading her owners decided on or about August 25 to abandon the voyage to Hamburg and to discharge the Hamburg cargo in London. On October 9 the Hamburg cargo, including five parcels, was seized as prize. As regards the first of these parcels, the registrar was asked to allow the claim to stand over as the goods had not yet been condemned, and the claim in respect of the fifth parcel was withdrawn. The freight claimed in respect of the remaining three parcels, namely, fifty bales of twisted sea grass, two bales of feathers, and one thousand and forty-four cases of lard, totalled 150*l.* 1*s.* 9*d.* In respect of these three parcels, decrees of condemnation of the goods or their proceeds had already been pronounced.

The reasons for which the registrar rejected the claim for compensation in lieu of freight in respect of these three consignments were given as follows in his report. "I must pay "regard to the rate of freight originally agreed, the extent "to which the voyage has been made, to the expense to "which the shipowner has been put and the benefit accruing "to the cargo. Having regard to these matters, I have to "give the shipowner compensation in lieu of the freight of "which he has already received by far the larger part. "Compensation implies that the shipowner has lost something. "On the facts I find he has failed to prove any loss. Indeed, "as matters stand, I find that the claimants are financially "better off than they would have been if the voyage had run "its normal course. The shipowner has received his full "bill of lading freight less 150*l.* 1*s.* 9*d.* One of the matters I "have to have regard to is the expense incurred by the "shipowner. The shipowner, by deciding to end his voyage "in London, has saved himself the expense of moving a "nine thousand eight hundred and ten ton twin screw "steamship from London to Hamburg. The cost of that, "having regard to wages, coal, insurance, pilotage and tug "attendance, would be large. He has failed to collect "150*l.* 1*s.* 9*d.* freight, but must have saved a larger sum. I "am not satisfied that the shipowner has lost any sum, and "until it is proved that he has, no question of compensation "can arise."

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A. J. Hodgson for the claimants. Freight is not payable on the cargo as a whole, but on the individual consignments, and voyage accounts and the question whether the shipowners would make a profit or a loss on the carriage of the particular parcels are irrelevant. The Crown, when it seizes goods in prize, takes cum onere, and the claimants are entitled to be paid a quantum meruit, which, as the freight to London is the same as the freight to Hamburg, should be 150*l.* 1*s.* 9*d.* In *The Juno* (1), the first case in which British shipowners were held to be entitled to compensation in lieu of freight, as neutral shipowners had always been, *The Twilling Riget* (2), Sir Samuel Evans said that, even if the cargo was not carried to its destination, it would be just in some cases that the whole amount of the freight should be paid. "For instance, suppose "an enemy cargo were shipped before the war from Australia "for Hamburg, and was seized near British waters and taken "to Bristol, it may be that it would be fair to pay the ship-"owners the full freight." *The Juno* (1) was followed and the principle further explained in *The Iolo* (3).

B. J. M. Mackenna for the Crown. *The Juno* (1) made new law devised for a case of exceptional hardship. In the present case the shipowners are better off than they would have been if war had not broken out and the ship had proceeded to Hamburg. The question is: Have the claimants suffered any real loss? In *The Juno* (1) Sir Samuel Evans said that regard must be had to the labour and cost expended. No doubt, compensation in lieu of freight is to be assessed on the particular consignment, but the registrar could not calculate labour and cost expended without having regard to the voyage as a whole, and profit and loss accounts are very material to the inquiry. *The Juno* (1) lays down that it is only where it is equitable that a British shipowner is given compensation in lieu of freight on condemned cargo. In *The St. Helena* (4), an action between shipowners and cargo owners, where, war having broken out, the voyage was abandoned as unlawful,

(1) [1916] P. 169, 175.
(2) (1804) 5 C. Rob. 82, 85.
(3) [1916] P. 206, 216.
(4) [1916] 2 A. C. 625.

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it was held that the shipowners were not entitled to any freight. It is admitted that the present case is distinguishable, as the voyage was abandoned before the outbreak of war and the claimants would have been entitled to freight under the terms of the bills of lading. In view, however, of Sir Samuel Evans's words in *The Juno* (1) that "this court has "no concern with the contracts between the shipowners and "shippers or cargo owners," the abandonment clause in the bills of lading would be irrelevant. [Reference was also made to *The Katwijk* (2).]

[On the subsidiary question as to the amount of the compensation if the claimants were held to be entitled to compensation and the full freight to Hamburg was not to be allowed, it was ultimately agreed that the compensation should be based on the steaming distance from Hongkong to London.]

Cur. adv. vult.

1941. Dec. 4. THE PRESIDENT (LORD MERRIMAN) read a judgment in which he stated the facts as set out above, and continued: Before the registrar it was contended, on the authority of *The St. Helena* (3), that a British ship which had abandoned the voyage from a neutral port to Hamburg in consequence of the outbreak of war was not entitled to be awarded by the Prize Court any compensation in lieu of freight in respect of cargo seized at an English port subsequent to the abandonment of the voyage. It was, however, expressly admitted before me by Mr. Mackenna on behalf of the Crown that this claim, if otherwise sustainable, was not barred by the decision in *The St. Helena* (3), which was distinguishable, as the registrar has held, by reason of the express provision in the bill of lading. This claim, therefore, presents the novel feature that, except as to a very small proportion of the claim, it is not in respect of freight which, by seizure, the owner is prevented from earning, but is in respect of the loss of freight,

(1) [1916] P. 169, 173.
(2) [1916] P. 177.
(3) [1916] 2 A. C. 625.

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the larger proportion of which is actually due under the bills of lading, but which the outbreak of war effectually prevents him from collecting. However, as nothing has been made of the point I need do no more than refer to it.

In his report the registrar points out that the Hamburg cargo seized in London falls into three classes: (1.) cargo on which the freight had been prepaid when it was shipped, in respect of which there would be no ground for claim; (2.) cargo on which freight had not been prepaid when it was shipped, and which was released to the claimants after seizure without a hearing in court: (this cargo appears to have been released on the following condition: (*a*) "Subject to "such rights (if any) over the goods which the shipowners had "at the date of the seizure hereof." The shipowner was thereby enabled to collect any freight which had not been prepaid on this class of cargo); (3.) cargo on which the freight had not been prepaid when it was shipped and which was condemned as good and lawful prize. The five parcels originally in question fall within this last class. I am now concerned with three only, and it is admitted that, apart from these five consignments, the shipowner has received the full freight in every case.

[His Lordship read the registrar's reasons for rejecting the claim.] I am not sure what is meant by the finding that, as matters stand, the claimants are financially better off then they would have been if the voyage had run its normal course. If the ship had completed the voyage to Hamburg, at the time and in the circumstances then prevailing, it is not difficult to imagine that she might have found some difficulty in leaving Hamburg before war broke out, and would have been seized there. Indeed, it was the fear of this very thing which led to the abandonment of the voyage in London. But if by the voyage running its normal course is meant if the vessel had completed her voyage without any complications arising from an outbreak of war, I doubt whether there is any material for this conclusion. On this assumption the normal course of business, including the probability of loading a profitable cargo in Hamburg, would

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have to be taken into consideration. If, on the other hand, as was assumed in the argument, it is meant that, if the vessel had completed the voyage for the benefit of these three consignments only, to do so would have cost her more than the 150*l.* 1*s.* 9*d.* she would have earned in freight in respect of them, the conclusion appears to be based on a false hypothesis. The amount of the Hamburg cargo is not stated. It is clear, however, from the registrar's findings that it consisted of more than the three consignments now in question, or rather, than the five consignments originally in question. I have, for example, judicial knowledge of the fact that twenty tons of latex consigned to Hamburg were discharged in London, for precisely the same reasons as prevailed in this case: see *The Glenearn* (1), and it may fairly be assumed that the whole of the Hamburg cargo, whatever its amount, was discharged in London, because of the abandonment of the voyage there: it must, therefore, be fallacious to contrast the extra cost of the voyage from London to Hamburg with the freight on these three consignments only. But my difficulty is in understanding how a claim in respect of the freight on a particular parcel that has been condemned can be affected by the fact that freight has or has not been received in respect of other parcels whether released or condemned, and if received, whether by prepayment or as a condition of release.

This was the main point argued, and it raises a question of principle of general importance. Is compensation in lieu of freight to be assessed in relation to each individual contract of affreightment in respect of goods condemned, or, if not, is it to be assessed by bringing into consideration the shipowner's position in respect of the cargo as a whole, or some, and what, part thereof? In other words, is the freight for the loss of which compensation is to be awarded to be regarded distributively or collectively? As there was no discovery before the registrar and no documents were put in, I have not seen the actual bills of lading, but it was assumed that each of these three parcels was covered by a separate bill of lading.

(1) [1941] P. 51.

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The President.

The right of a British shipowner to claim compensation in lieu of freight was first established during the last war in *The Juno* (1). In that case Sir Samuel Evans laid down the principle by which the registrars and merchants should be guided in assessing compensation in the following passage (2): "Such a sum is to be allowed for freight as is fair and "reasonable in all the circumstances, regard being had to the "rate of freight originally agreed (although this is not "necessarily conclusive in all cases), to the extent to which "the voyage has been made, to the labour and cost expended, "or any special charges incurred in respect of the cargo seized "before its seizure and unlivery, and to the benefit accruing "to the cargo from the carriage on the voyage up to the seizure "and unlivery; but no sum is to be allowed in respect of any "inconvenience or delay attributable to the state of war or "to the consequent detention and seizure." This was an extension to British owners of the practice established in favour of neutral owners before the Declaration of Paris, in conformity with the practice adopted during the Crimean war, prohibiting the seizure of enemy goods, except contraband, in neutral bottoms. A neutral shipowner who had made an innocent contract to carry enemy goods was awarded the whole freight in spite of the fact that by reason of the seizure of the goods it was impossible for him to deliver them at their destination. It is unnecessary to discuss whether this was, as it was usually described as being, an award of freight itself, on the theory that the seizure was equivalent to unlivery, or whether it was really compensation in lieu of freight of which the proper measure was the full amount of the freight. Before the last war, however, it is clear that freight, or compensation in lieu of freight, in respect of contraband cargo, was very rarely allowed: *The Prins der Nederlanden* (3), per Lord Sumner: and, though in the last war compensation was allowed for loss of freight in such cases, it was only where the claimants could establish a strong case on the merits: see

(1) [1916] P. 169; 1 Br. & Col. P. C. 151.
(2) [1916] P. 175; 1 Br. & Col. P. C. 162.
(3) [1921] 1 A. C. 754, 756; 3 Br. & Col. P. C. 943, 948.

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The Katwijk (1) and *The Prins der Nederlanden* (2). And, as in *The Juno* (3) Sir Samuel Evans made it plain that, even in the case of British owners, though there was no question of awarding the full freight as a matter of course, it might be just in some cases that the whole amount of the freight should be paid, so in *The Katwijk* (1) he decided that compensation was payable to a neutral shipowner on the same principles as in *The Juno* (3) where, though the shipment took place after the outbreak of war, the cargo had not then been declared to be contraband and the shipowner had acted in good faith. The important point, as I see it, is that in either of these cases it is permissible, though not obligatory, to award the whole freight payable in respect of the particular parcels seized, though it goes without saying that a considerable part of the freight in each case must be swallowed up by the necessary expenses of earning it. Mr. Mackenna admitted that he was unable to give me any authority for taking anything in the nature of a profit and loss account. The highest at which he put his argument was that there is nothing in the rule laid down by Sir Samuel Evans which precludes this. But I think there is. I think that it is implicit in the very nature of the claim that it is the freight itself and not any profit to be made out of the freight which is primarily the basis of the compensation, and it would be manifestly impossible to award the whole freight on any other basis.

It is true that in *The Prins der Nederlanden* (2), a case in which the only merit put forward on behalf of the ship carrying contraband shipped in the second year of the war was mere ignorance that the goods were contraband, Lord Sumner, in answer to the argument of hardship, pointed out that the shipowner could have protected himself from loss by demanding the freight in advance in accordance with the practice which by then had become common, but there is not a hint in his judgment that a claim, otherwise meritorious, could be defeated by the fact that in respect of other consignments

(1) [1916] P. 177; 1 Br. & Col. P. C. 282.
(2) [1921] 1 A. C. 754, 756; 3 Br. & Col. P. C. 943, 948.
(3) [1916] P. 169; 1 Br. & Col. P. C. 151.

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he had been lucky, or wise, enough to take this precaution.

In the rule laid down in *The Juno* (1), I read the references to the " cargo," " voyage " and " freight " distributively, in relation to each parcel condemned. But if they are to be read collectively and the fact that freight has been received on other parts of the cargo is relevant, what part of the remainder of the cargo should be brought into the calculation ? Is it to be the cargo condemned only, or all the cargo seized, whether ultimately condemned or released, or all cargo for the same destination, whether seized or not, or the whole cargo whatever its port of shipment or destination ? On this basis I see no escape from taking the whole voyage into account, as in effect the registrar has done. But if the accident that freight has been prepaid on certain cargo not condemned, though freight has not been received in respect of cargo condemned, disentitles the shipowner to recover anything in respect of the latter freight, he ought logically, in the converse case, to be allowed to claim compensation in lieu of freight on cargo not seized, the recovery of which has been made impossible by the detention of the ship, although the whole freight on the cargo condemned has been prepaid. But there is no precedent for such a claim against successful captors. I confess that I can see no limit to the difficulties which might arise in applying the rule in *The Juno* (1) on these lines. On the other hand, if the freight in respect of the loss of which compensation is to be paid in the case of a mixed cargo is regarded in the usual sense of the word as being the consideration for the agreement to carry a particular parcel of goods covered by a bill of lading (see art. 1 of Scrutton on Charterparties and Bills of Lading), and " cargo " and " voyage " are interpreted accordingly, the calculation is comparatively simple. In a case in which it is admitted that the shipowner's merits are unimpeachable, a particular parcel has been seized and condemned and the shipowner is unable to recover the freight in respect of it, while the Crown gets the benefit of its carriage, the measure of the compensation is to be a sum, not exceeding the whole of that freight, to be computed according to the rule in *The*

(1) [1916] P. 169; 1 Br. & Col. P. C. 151.

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Juno (1). To introduce extraneous considerations referable to other parcels seems to me neither to be sound in principle nor to be warranted by authority.

While both counsel agreed in relying on *The Juno* (1) as establishing the principles to be applied, Mr. Mackenna distinguished the case on the ground that, in the circumstances of that case, the shipowner could have received nothing by way of freight from anybody, whereas in the present case he had received the greater part of his freight, either by prepayment or through the release of the cargo in the Prize Court. Mr. Hodgson, on the other hand, relied on a passage in Sir Samuel Evans's judgment (2) as showing that the President would have awarded the full freight in this case, since the greater portion of the voyage, fairly comparable with the illustration there given, had been completed. It seems to me, however, that, apart from the respective distances accomplished, there is no real resemblance between that illustration and the present case. There the ship was seized and diverted to Bristol, while here the owners themselves, by virtue of the provisions of the bill of lading, abandoned the voyage and discharged the goods which were not seized until after discharge. Moreover, the bill of lading itself provides that in such case only a proportionate part of the freight, if not prepaid, shall be payable. Happily, though alternative methods of calculating the proportion were suggested, counsel eventually agreed that, in the event of my holding, as I do, that the claimants are entitled to some compensation in lieu of freight, but that it would not be right to award the full freight, it would be appropriate that I should award the sum of 144*l.* 7*s.* 7*d.*, based on the mileage from the port of loading to London as compared with the mileage to Hamburg, namely, 10801/11228ths of 150*l.* 1*s.* 9*d.*, and I give judgment for that sum accordingly.

Solicitors for claimants: *Hill, Dickinson & Co.*
Solicitor for the Crown: *Treasury Solicitor.*

(1) [1916] P. 169. (2) Ibid. 175.

E. C. M. T.

THE VERNON CITY.

C. A. 1942 Jan. 13, 14, 15.

Shipping—Collision—Convoy orders—Speed in fog—Supercession of Regulations for Preventing Collisions at Sea—Defence (General) Regulations, 1939, *reg.* 43 (1.)—*Emergency Powers (Defence) Act*, 1939 (2 & 3 *Geo.* 6, *c.* 62), *s.* 1, *sub-s.* 4.

By s. 1, sub-s. 4, of the Emergency Powers (Defence) Act, 1939, it is provided that " a Defence Regulation, and any order " . . . . made in pursuance of such a regulation, shall have effect " notwithstanding anything inconsistent therewith contained in " any enactment other than this Act . . . ."

By reg. 43 (1.) of the Defence (General) Regulations, 1939, made under the Act, the Admiralty was empowered to make navigation orders which, by reg. 43 (2.) if contravened or not complied with by any vessel, involved an offence for which the master should be deemed guilty.

In the exercise of these powers the Admiralty made an order (St. R. & O. 1939, No. 1157) (Navigation Order No. 1, 1939) providing that " British merchant vessels at all times and Dominion " vessels when in British territorial waters shall comply with any " sailing . . . . instructions which may . . . . be issued to them " by the Admiralty or any person authorized by the Admiralty " to act under this order." The persons so authorized were the naval control officers, who in turn were empowered to delegate their authority to commodores of convoys. The sailing orders for ocean convoy provided that ships were to obey the orders of the commodore.

Two British ships, the *L.* and the *V. C.*, came into collision in a dense fog. The *L.* was a single ship; the *V. C.* was in convoy. The *L.* was proceeding very slowly; the *V. C.*, under convoy orders, was proceeding at seven knots :—

Held, that the master of the *V. C.*, under directions which had the force of legislative enactments, was bound to obey the convoy orders, although they ran counter to the Regulations for Preventing Collisions at Sea as to speed in fog; that accordingly the *V. C.* was not negligent for proceeding at a speed which, if she had not been under special orders, could not be justified; and that on the facts neither vessel was to blame.

Decision of Langton J., ante, p. 9, affirmed.

APPEAL from Langton J., in an action of damage by collision brought by the plaintiffs, the owners of the steamship *Lairdscastle*, against the defendants, the owners of the steamship *Vernon City* (1).

The facts are set out fully in the report of the hearing before

(1) Ante, p. 9. The appeal was heard in camera and is reported with the consent of the court.—Reporter.

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Langton J. (1), who held that the *Vernon City* had a paramount duty to obey the convoy orders, which were clothed with complete legislative authority, although they ran counter to the Regulations for Preventing Collisions at Sea as to speed in fog; that accordingly the *Vernon City* was not negligent for proceeding at a speed which, if she had not been under special orders, could not be justified; and that on the facts neither vessel was to blame. The plaintiffs appealed.

Hayward K.C. and *Owen Bateson* for the plaintiffs.

Sellers K.C. and *Brightman* for the defendants.

The arguments were substantially the same as in the court below (2).

MACKINNON L.J. If the existence of the fog and the speed at which the *Vernon City* was proceeding were the only material facts, it would be tolerably clear that the vessel would be at fault for the collision by reason of a manifest breach of art. 16 of the Regulations for Preventing Collisions at Sea which provides that: "Every vessel shall in a fog . . . . "go at a moderate speed." Having regard to the density of the fog, nobody could suggest that seven knots was a moderate speed. The *Vernon City*, however, was one of a flotilla of ships proceeding in convoy, and the commodore of the convoy had directed the vessels in it to proceed at seven knots. The principal question which arises, therefore, is whether the *Vernon City* was under such legal compulsion to obey the order of the commodore to go at seven knots that she cannot be held guilty of breaking a regulation which, by virtue of s. 419 of the Merchant Shipping Act, 1894, has the force of an enactment by Parliament.

[His Lordship read s. 1, sub-s. 4, of the Emergency Powers (Defence) Act, 1939; reg. 43, paras. (1.) and (2.), of the Defence (General) Regulations, 1939; and Navigation Order No. 1, 1939, and continued:] Those being legislative enactments, or directions or orders having the force of legislative enactments, by virtue of the provision in the Emergency Powers

(1) Ante, pp. 10, 11. (2) Ante, pp. 11, 12.

(Defence) Act, 1939, Langton J. came to the conclusion that the master of the *Vernon City* was under compulsion to obey the order of the commodore of the convoy to go at seven knots. He says: "It would seem . . . . that convoy orders which "run counter to the collision regulations are not executive "commands which are contrary to the existing law, but are "paramount orders which the convoy commodores are "legally entitled to give notwithstanding the law and which "individual ships in the convoy are legally bound to "obey" (1). If, therefore, the master in going at the speed mentioned, was only obeying a command which he was bound by law to obey, it was impossible to hold that it was negligent of him so to obey the law to which he was subject.

Mr. Hayward argued that the owners of a ship may be found liable for a collision which has been brought about by the act of a compulsory pilot whom by law they are compelled to employ, and that there is some analogy between obedience to the orders of a compulsory pilot and obedience to the orders of the commodore in the present case. But the essential and obvious difference between those two positions is that the liability of an owner of a ship which has caused damage through the action of a compulsory pilot arises by virtue of the Pilotage Act, 1913, for at common law an owner was not liable for such damage. In this case there is no equivalent provision in any Act of Parliament, Order in Council, or other enactment that an owner is to be liable for the result of an order negligently given by the commodore in charge of a convoy. I think, therefore, that Langton J. was right as a matter of law in holding that, as the master of the *Vernon City* was bound by the existing state of legislative enactment to obey the command to go at seven knots, he cannot be found guilty of a breach of art. 16, and, therefore, of negligence in obeying the order and going at that speed.

[His Lordship dealt with the facts and said that both he and the assessors agreed with the conclusion arrived at by Langton J. that the *Vernon City* was not negligent in not, when she

(1) Ante, pp. 24, 25.

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heard the whistle of the *Lairdscastle*, at once stopping and reversing her engines, and in not so doing when she saw the masthead light of the *Lairdscastle* but delaying until she saw the port light of that vessel:] In these circumstances I think it would have been almost sufficient for me to have said that I agree entirely with the whole of the judgment of Langton J., which is much more elaborate and detailed than the brief account which I have given. In the result, the appeal fails.

DU PARCQ L.J. I agree. I also think that the judgment of the learned judge contains everything that need be said. There is only one question which can properly be called a question of law, and that, I think, almost answers itself. It is whether, having regard to the Emergency Powers (Defence) Act, 1939, and the regulations made thereunder, it can be said that the master of the *Vernon City* was negligent in going at a speed which undoubtedly, apart from those regulations, would have constituted negligence in fog. My Lord has already dealt with that question, and I say no more about it except that the answer to it appears to me to be obvious.

In spite of Mr. Hayward's argument, I still feel that the other questions in the case are essentially questions of fact. [His Lordship dealt with these, said that he agreed with Langton J. and continued:] I only want to add this. During the present war, many such questions of fact, some of them difficult, will probably arise. It may be feared that this is not the last case in which collisions will occur in fog between ships in convoy and a single ship. It is likely enough that in some of those cases the ships in convoy will properly be found to blame. Each case will depend on its own facts and circumstances. I hope that no attempt will be made, by collecting and collating the decisions of the judges of the Admiralty court or of this court on such questions of fact, to build up a new body of what it would be wrong to describe as case law. It is elementary to say that a decision on fact is in no sense a binding precedent. As Lord Wright said in

The Heranger (1), it is at best a doubtful guide. It cannot make new law. I agree that this appeal should be dismissed.

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LEWIS J. I agree. I have nothing to add on the question of law with regard to the speed of this vessel. With regard to what I entirely agree is a question of fact, namely, whether or not there has been a breach of duty, or, in particular, a breach of art. 16, this question must depend on the circumstances of each case. Langton J. has, in my view, quite properly applied his mind to the question which he had to consider. He has said that it is not his desire or intention "to lay down any principle "by which vessels in convoy can be said to be excused from "any obligation under the sea rules which they could properly "fulfil" (1). A little later on he points out that in the case of a ship apparently acting in breach of art. 16, he would require "strong evidence of special circumstances or special danger "to exonerate her from non-observance of her duty under the "rules" (2). He came to the conclusion that this was a case in which there were special circumstances which absolved the master of the *Vernon City* from carrying out art. 16. I agree that the appeal must be dismissed.

Solicitors for plaintiffs: *Thomas Cooper & Co., for Batesons & Co., Liverpool.*

Solicitors for defendants: *Constant & Constant, for Gilbert Robertson & Co., Cardiff.*

(1) [1939] A. C. 94, 101. (2) Ante, p. 27.

E. C. M. T.

DIPPLE *v.* DIPPLE.

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Jan. 20.

Divorce—Maintenance—Security—Death of husband—"Cause of action" surviving against his estate—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 & 25 *Geo.* 5, *c.* 41), *s.* 1.

The right of a wife to whom a decree absolute of divorce has been granted to apply for secured maintenance under s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, is not a "cause of action" against her husband within s. 1,

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sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934, and, therefore, on the death of the husband, it does not survive against his estate.

SUMMONS adjourned into court.

On December 17, 1937, the wife was granted a decree nisi of divorce and the custody of a daughter, now aged fifteen years. In February, 1938, she applied to the court under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1), for (1.) secured maintenance for herself, (2.) maintenance during the joint lives of herself and her husband. She also applied for maintenance for the daughter. On November 14, 1938, the decree was made absolute. On May 9, 1939, an interim order was made for maintenance during the joint lives of the parties. Negotiations followed with a view to an agreed order for permanent maintenance and security. On September 13, 1939, the husband married again. On March 5, 1940, he was ordered to file further evidence of his means. On November 27, 1940, before the affidavit was filed, he died intestate, leaving some 6100*l.* The Public Trustee was granted letters of administration, and on December 5, 1941, the wife issued a summons asking the court to join the Public Trustee as a party on the application for secured maintenance for her life on the ground that, notwithstanding the husband's death, her claim survived as a cause of action under s. 1, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934 (2).

(1) By Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 1: "The court may, "if it thinks fit, on any decree for "divorce or nullity of marriage, "order that the husband shall, "to the satisfaction of the court, "secure to the wife such gross "sum of money or annual sum "of money for any term, not "exceeding her life, as having "regard to her fortune, if any, "to the ability of her husband "and to the conduct of the "parties, the court may deem to "be reasonable . . . ." By sub-s. 2: "In any such case as "aforesaid the court may, if it "thinks fit, by order, either in "addition to or instead of an "order under sub-s. 1 of this "section, direct the husband to "pay to the wife during the joint "lives of the husband and wife "such monthly or weekly sum "for her maintenance and support "as the court may think reason-"able."

(2) By Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, sub-s. 1: "Subject to the "provisions of this section, on

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Clifford Mortimer for the wife.
William Latey for the Public Trustee.

HODSON J. The question which I have to decide is whether a wife, whose husband has died after a decree absolute has been pronounced against him, can obtain an order against his personal representative for secured maintenance under s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925.

It is conceded that, with the death of the husband, the claim for maintenance during joint lives and for the maintenance of the child cannot be further proceeded with, but it has been argued on behalf of the wife that the application for secured maintenance can proceed notwithstanding the death of the husband by reason of s. 1, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934. In other words, it is said that the wife has a cause of action which survives against the personal representative of the husband. It is, no doubt, true that the fact that the main suit is at an end does not of itself preclude applications in ancillary matters. For example, the court has entertained an application by children after the death of the husband for variation of a marriage settlement under the Matrimonial Causes Act, 1859, s. 5 : *Smithe* v. *Smithe and Roupell* (1). It cannot, however, I think, be said that apart from the Law Reform Act, 1934, an order of any sort under s. 190 could have been made against any one but the living husband. The only question, therefore, is whether the right to apply for a sum to be secured to a wife for a term not exceeding her life can be said to be " a "cause of action."

A cause of action is defined in Stroud's Judicial Dictionary

" the death of any person after " the commencement of this Act " all causes of action subsisting " against or vested in him shall " survive against, or, as the case " may be, for the benefit of, his " estate. Provided that this " section shall not apply to causes " of action for defamation or " seduction or for inducing one " spouse to leave or remain apart " from the other or to claims under " s. 189 of the Supreme Court of " Judicature (Consolidation) Act, " 1925, for damages on the ground " of adultery."

(1) (1868) L. R. 1 P. & M. 587.

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Hodson J.

as the entire set of circumstances giving rise to an enforceable claim. As Lord Esher said in *Cooke* v. *Gill* (1), and later in *Read* v. *Brown* (2), a cause of action is "every fact that it "would be necessary for the plaintiff to prove, if traversed, "in order to support his right to the judgment of the court." The only cause of action which the wife had was, in my opinion, the matrimonial offence on proof of which she obtained a decree of dissolution. If the husband had died during the pendency of the suit the Law Reform Act would, no doubt, have kept this cause of action alive so as to enable the wife to have proceeded with the suit had not his death brought about the very thing claimed, namely, the dissolution of the marriage. An application for maintenance is, however, as Bateson J. pointed out in *Mould* v. *Mould* (3), a different proceeding. The matrimonial offence on which the petition was based does not give rise to an enforceable claim for maintenance. Sect. 190 of the Judicature Act, 1925, provides that the court may, if it thinks fit, order the husband to secure to the wife such a sum of money as the court may deem to be reasonable. The wife thus has merely the right to ask the court to exercise discretionary powers in her favour. This seems to me to be an essentially different thing from her having an enforceable claim against the husband.

I should perhaps add that I have been referred to an order made in chambers in *Richards* v. *Richards and Flockton* (4), where taxation of costs was allowed to proceed against the personal representative of a co-respondent who had died after decree. The order for costs having been made against the co-respondent in his lifetime there was, I think, an enforceable claim against him which was kept alive by the

(1) (1873) L. R. 8 C. P. 107.
(2) (1888) 22 Q. B. D. 128.
(3) [1933] P. 82.
(4) 1940. Unrep. In the undefended suit of *Richards* v. *Richards and Flockton* the husband petitioner was granted a decree nisi of divorce on January 11, 1940, on the ground of his wife's adultery, and an order for costs against the co-respondent. On January 30, 1940, the co-respondent died intestate, and on June 14, a grant of letters of administration of his estate of the value of about 800*l.* was made to his mother. On the petitioner's application for the costs to be taxed against the co-respondent's estate Hodson J. made an order as prayed.

Law Reform Act. In the present case, however, the wife has not, in my judgment, any cause of action within the meaning of the Law Reform Act, and, therefore, her application to join the Public Trustee as a party fails and must be dismissed.

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Application dismissed.

Solicitors for the wife : *Kenneth Brown, Baker, Baker.*
Solicitors for Public Trustee : *Blundell, Baker & Co.*

W. L.

THE LARCHBANK.

C. A.
1942
Jan. 21, 22.

Shipping—Collision—Vessels in convoy—No fog signals—Admiralty directions—" Emergency."

The *B. P.* was the last vessel in her column in a convoy, and the *L.* was under orders to join the convoy and to take station astern of the *B. P.* The two vessels sighted each other at a distance of some three-quarters of a mile. They exchanged signals, and each knew what the duty of the other was. The *L.* put her engines full speed ahead and her wheel hard-a-starboard and proceeded towards the *B. P.*, which maintained her course at the convoy speed of eight knots. A fog then came down, reducing the visibility to about a ship's length. When the vessels next sighted each other the *L.* was practically across the stem of the *B. P.* at about a right angle and a collision occurred. Neither ship had sounded fog signals, the *B. P.* not doing so because Admiralty directions were that the use of fog sirens or whistles in fog by ships in convoy was undesirable, and " they are not to " be sounded except in an emergency or on hearing another ship " approaching, when the master must use his discretion." In a collision action brought by the owners of the *B. P.* against the owners of the *L.*, the assessors took the view that, as a question of seamanship apart from the Admiralty directions, the *B. P.* should have sounded fog signals :—

Held, that the master of the *B. P.*, was forbidden by the directions, which had statutory authority, to sound his whistle or siren except in an emergency ; that fog in itself was not an emergency, and that he was entitled to assume that the *L*, would take the right manœuvres ; that no emergency, therefore, arose after the fog enveloped the *L.*, on the occurrence of which the master of the *B. P.* ought, in his discretion, to have sounded fog signals, that, accordingly, the *L.* was alone to blame.

Decision of Bucknill J. reversed.

APPEAL from Bucknill J.

The plaintiffs were the owners of the motor vessel, *British*

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Petrol, and the defendants were the owners of the motor vessel, *Larchbank*. On April 24, 1940, the *British Petrol* was one of a flotilla of five ships in the Irish Sea, sailing in company from the Clyde to join a large convoy. There were two columns and the *British Petrol* was the sternmost of three vessels in the starboard column. The *Larchbank* had come from Belfast under orders to join the flotilla, taking her place astern of the *British Petrol*. When it was growing dusk, but while the weather was clear, the *British Petrol* and the *Larchbank* sighted one another and exchanged signals by flash lamp and their names. The master of each ship then knew that the duty of the *Larchbank* was to take her place astern of the *British Petrol*. When the vessels sighted one another the *British Petrol* was on the convoy course of 144° true making eight knots, and she saw the *Larchbank* about three or four points on the port bow at a distance estimated at about seven cables. The *Larchbank* then put her wheel hard-a-starboard and her engines at full speed, a manœuvre which would take her in the direction of the *British Petrol*. Shortly afterwards a dense fog descended. Both vessels continued on their courses at the same speed. Neither vessel sounded any fog signals, but the *British Petrol* put out a cluster light at her stern. Both vessels were carrying dimmed side lights and a mast-head light. The master of the *Larchbank* asserted that he sounded fog signals, but Bucknill J. disbelieved him. The master of the *British Petrol* said that he did not sound any fog signals because he believed that he was forbidden to do so by Admiralty regulations. The two vessels suddenly saw one another with the *Larchbank* practically crossing the stem of the *British Petrol* at more or less right angles. The speed of both ships made it impossible to avoid collision, and the *British Petrol* crashed into the starboard side of the *Larchbank* about midships.

In a collision action brought by the plaintiffs against the defendants, Bucknill J. found the *Larchbank* to blame for keeping on at full speed under hard-a-starboard wheel and also for not sounding her whistle after the fog set in. As regards the *British Petrol*, Admiralty instructions as to

the use of fog sirens or whistles in a fog by ships in convoy were that their use was undesirable and " they are not to be "sounded except in an emergency or on hearing another ship " approaching, when the master must use his discretion." Bucknill J. said that the *British Petrol*, in a dense fog, was proceeding at a speed which, but for the Admiralty instructions for the convoy, would have been greatly in excess of what was moderate in that weather; that she knew that the *Larchbank* was approaching, but did not know whether that vessel was edging away or towards her; and that, in his view, a state of emergency had arisen, and the *British Petrol* ought to have sounded a fog signal, in accordance with art. 15 of the Regulations for Preventing Collisions at Sea, to tell the *Larchbank* where she was. He held the *Larchbank* three-fourths to blame and the *British Petrol* one-fourth. The plaintiffs appealed (1).

Pilcher K.C. and *Owen Bateson* for the plaintiffs. The *British Petrol* is not to blame for not sounding fog signals. When the fog closed down no emergency arose. Bucknill J. was wrong in saying that " although the instructions issued to "ship masters by the Admiralty override the written regulations "[the Regulations for Preventing Collisions at Sea], still the "Admiralty leave it to the discretion of the master to decide "whether he should sound the whistle signal necessary to the "case." Under the Admiralty directions the master of the *British Petrol* was forbidden to sound his whistle except in circumstances which did not occur.

Hayward K.C. and *Porges* for the defendants. The *British Petrol*, which, apart from convoy orders, was proceeding at the inexcusable speed of eight knots in a dense fog, ought to have been sounding fog signals. An emergency had clearly arisen. In fog, with a visibility of only about a ship's length, the master of the *British Petrol* had no right to assume that the *Larchbank* would be able exactly to judge the position of the *British Petrol*, which was going ahead at high speed, and fall

(1) There was a cross-appeal by the defendants, but it does not call for report.

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into station astern of her. Whistle signals would have indicated her position.

MACKINNON L.J. Bucknill J. had no doubt that the *Larchbank* was seriously to blame and I agree with him, but he has also held that the *British Petrol* was to blame in a less degree, the fault which he attributed to her being her failure to give any sound signals when the fog closed in.

Article 15 of the Regulations for Preventing Collisions at Sea provides that a steam vessel having way on her shall when in fog sound a long blast at least every two minutes ; and if this collision had taken place in normal times there could be no question that the *British Petrol*, steaming at eight knots in fog, was under a duty so to sound her whistle. The *British Petrol*, however, was subject to the Admiralty directions applicable to vessels sailing in convoy. These directions, as was pointed out recently in *The Vernon City* (1), have statutory authority under emergency legislation equal to the statutory authority of the Regulations for Preventing Collisions at Sea issued under the Merchant Shipping Act, 1894, and if there is diversity between the duty imposed by the regulations and the Admiralty directions the latter are to prevail. The *British Petrol* was going at eight knots in a dense fog, but no one has sought to rely on this as a breach of the Collision Regulations since the Admiralty directions provide that vessels in convoy shall maintain the specified convoy speed in fog.

As regards the sounding of signals in fog, as required by art. 15 of the Collision Regulations, the Admiralty directions are as follows : " The use of whistles or sirens in a fog by "vessels in convoy is undesirable. They are not to be sounded "except in an emergency or on hearing another ship approach-"ing, when the master must use his discretion." The master of the *British Petrol* says in effect " If the Admiralty directions "and art. 15 of the Collision Regulations differ, I am bound "to obey the former. They order me not to sound my whistle "except in two events—(*a*) if there is an emergency, or (*b*) if

(1) Ante, p. 61.

"I hear another ship approaching. I may then use my "discretion. Neither of these events happened, and, therefore, "I remained subject to the prohibition." It is manifest that the second event did not happen, but the question whether there was an emergency remains. "Emergency" is defined by the Oxford Dictionary as—(*a*) "the sudden or unexpected "occurrence of a state of things," and (*b*) "a juncture that "arises or crops up, a sudden occasion." In this particular connection I should be inclined to define it as "the sudden "occurrence of facts causing an apprehension of danger or "difficulty."

The fog itself, or its density, cannot constitute an emergency. The direction contemplates an emergency supervening after the fog has arisen. What then was the emergency after the fog enveloped the *British Petrol* on the occurrence of which the master ought at his discretion to sound his whistle? Bucknill J. says of the *British Petrol:* "She knew the *Larchbank* was approaching her with the "intention of coming in under her stern to join the convoy. "She did not know the precise position of that vessel. She "heard no signal from her, and she did not know what she "was doing, *whether she was doing what she ought to do, edge "away, or whether she was edging towards her*, and, in my view, "a state of emergency had arisen so far as the *British Petrol* "was concerned with relation to the *Larchbank.*" In this quotation I have italicised some words. With all respect to the learned judge, I cannot agree with this view. The master of the *British Petrol* knew that those in charge of the *Larchbank* knew of and were also bound by the Admiralty regulations. They knew that it was the duty of the *British Petrol* to keep her speed in the fog and her course and not to sound her whistle unless the *Larchbank* invited her to do so by sounding hers, or unless an emergency arose. I cannot think that the master of the *British Petrol* ought to have imagined that the *Larchbank* was "*doing what she ought not to do*" (to use the judge's phrase), and that this apprehension created an emergency. In my view, he was entitled to assume that the *Larchbank* would do the proper thing, and I do not think that the

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Larchbank has established against the *British Petrol* that there was any emergency whereby the Admiralty prohibition of the sounding of the whistle by the *British Petrol* ceased to operate and left the master free to use his discretion. I do not agree with the judge's conclusion that the *British Petrol* was to blame for not whistling.

Bucknill J. had the assistance of one Elder Brother of the Trinity House. In discussing the culpability of the *Larchbank* he refers to the advice he has received from that assessor, but in regard to the question whether the *British Petrol* ought to have whistled he does not mention any consultation with him. The learned judge has furnished us with the notebook which he used in the case, and in that I find his note that he asked this question of the assessor: "Ought the *British Petrol* "to have sounded fog signals if she heard nothing from the "*Larchbank*?" and the answer was: "Yes." This court has had the invaluable assistance of Rear Admiral Macpherson and Captain Clarke. I put to them substantially the same question Bucknill J. put to his assessor, and they gave the same answer. In my view, however, we are concerned, not with a question of the art of navigation, but with one of the duty of a subject to obey the orders of those whose commands have the force of statutory legislation. In my opinion, the Admiralty directions, which have that sanction, forbade the master of the *British Petrol* to sound his whistle except in an event which did not happen, and I cannot think it right to hold him guilty of negligent navigation in not doing that which he was forbidden to do. In the result, I think that the appeal should be allowed and the *Larchbank* held solely to blame.

DU PARCQ L.J. I agree.

LEWIS J. I agree.

Appeal allowed.

Solicitors for plaintiffs: *Wm. A. Crump & Son.*
Solicitors for defendants: *Thomas Cooper & Co.*

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Jan. 26, 27, 28; Feb. 6.

Shipping—Collision—Apportionment of blame—Revision by appellate tribunal—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1, *sub-s.* 1.

The finding of the trial judge as to the degrees of blame to be attributed to two or more ships which are in fault under s. 1, sub-s. 1, of the Maritime Conventions Act, 1911, is a conclusion of fact, and as such is open to review by the Court of Appeal no more and no less than any other finding of fact of the trial judge.

Dicta in *The Karamea* [1921] P. 76 not followed.

APPEAL from Langton J.

On August 11, 1940, the plaintiffs' vessel, *Ceramic*, and the defendants' vessel, *Testbank*, were in collision off the coast of Africa. In an action of damage by collision, Langton J. held the *Testbank* three-quarters to blame and the *Ceramic* one-quarter. The defendants appealed.

This report is confined to the question, raised in the course of the argument, whether it is open to the Court of Appeal, while agreeing with the trial judge's conclusions of fact with regard to the circumstances in which the collision took place and the actions of the two ships, to vary his apportionment of the blame.

Hayward K.C. and *Owen Bateson* for the appellants.
Pilcher K.C. and *Porges* for the respondents.

Cur. adv. vult.

1942. Feb. 6. The following judgments were read.

LORD GREENE M.R. [after expressing his agreement with the conclusions of fact of Langton J. as to the circumstances in which the collision took place and with his finding that both ships were to blame :] Langton J. apportioned the liability as to one-quarter to the *Ceramic* and as to three-quarters to the *Testbank*. I have formed a clear opinion that this apportionment is too favourable to the *Ceramic*, and the

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question arises whether I am at liberty to give effect to that opinion. Apart from authority, I should have no doubt as to the answer, but in *The Karamea* (1) dicta are to be found which, if correct, impose a very strict limitation on the power of an appellate court to alter the proportions which have commended themselves to the trial judge in cases where the appellate court does not differ from him on the facts. Lord Sterndale M.R. said (2): "If we "agree with the learned judge on the facts and come to the "same conclusion as to the actions of the two ships, I think it "would need a very strong case indeed to induce this court to "interfere with his discretion as to the proportions of blame. "We have power to do it, but I do not suppose that we should "ever think of doing it." Warrington L.J. was less emphatic. He said (3): "It may well be and probably is "the case that if the court arrives at the same conclusion both "on the facts and in law it would not interfere merely because "the learned judge in his discretion has given proportions "which this court thinks it would not have given." Scrutton L.J. said (4): "If the Court of Appeal agrees with "the findings of fact and law of the learned judge below, and "the only difference is that it attaches more importance to a "particular fact than he did, it would require an extremely "strong case to alter the proportions of blame which the "learned judge below has attributed to the ships." It is with some trepidation that I venture to make some comments on these weighty observations. The duty of the court in apportioning blame is laid down in the Maritime Conventions Act, 1911, s. 1, which says that "the liability to make good "the damage or loss shall be in proportion to the degree in "which each vessel was in fault: Provided that (*a*) if, having "regard to all the circumstances of the case, it is not possible "to establish different degrees of fault, the liability shall be "apportioned equally . . . ." The questions, therefore, which the trial judge has to answer are: "What was the degree "in which each vessel was at fault?"; and: "Is it possible

(1) [1921] P. 76.
(2) Ibid. 78.
(3) Ibid. 83.
(4) Ibid. 89.

"to establish different degrees of fault?" The apportionment of liability follows automatically from the answers to these questions. It appears to me that these questions are questions of fact like any other question of fact. They are in their nature eminently suitable for submission to a jury, if such were the practice. They are not questions of law nor are they, with all respect to the view which Lord Sterndale M.R. and Warrington L.J. appear to have held, questions of discretion. It is true that the answer to them embodies the opinion of the judge as to the comparative degrees of fault to be attributed to two sets of negligence, but if, for example, the trial judge finds that it is not possible to establish different degrees of fault, why should it not be open to an appellate court to find that it is possible and that the degrees of fault are so and so? And if the trial judge finds that the degrees of fault are so and so, why should it not be open to an appellate court to find that, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, or that the degrees that it is possible to establish are different from those found by the trial judge?

In my opinion, therefore, the dicta which I have quoted, if read strictly, impose an unjustifiable limitation on the powers of an appellate court. It must not be taken that the finding of a trial judge as to the degrees of fault is to be lightly interfered with. No conclusion of fact of a trial judge ought ever to be lightly interfered with, even where it is not aided by such matters as the demeanour of a witness. But this court is in as good a position as the trial judge to form an opinion, and all that I am concerned to say is that the finding of the trial judge as to the degrees of fault is no more and no less open to review than any other conclusion of fact where that is the case. If this court forms the clear opinion that the proportions ought to be altered, it is, in my opinion, its right and its duty to say so. In the present case I have formed the clear opinion that the *Ceramic* ought to be held to have been at least equally to blame with the *Testbank*. There were more ways than one in which she could by good seamanship have avoided a collision. She had ample time in

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which to decide what was the right action to take. Had there been any doubt as to what she ought to do the position would have been very different. But there was no doubt whatever and the action which she in fact took was the one action which she ought not to have taken and was, from the point of view of seamanship, quite unpardonable: "something," to quote the words of Langton J., "which all the instincts of good seamanship told her not to do, and quite clearly and inescapably "wrong." In these circumstances I have hesitated before deciding that the degree in which the *Ceramic* was in fault ought not to be fixed at more than one-half. But on the whole I think that the safer view is to hold that the two vessels were equally at fault and that the liability ought to be apportioned equally between them. The judgment of Langton J. will be varied so as to give effect to this decision.

MACKINNON L.J. [having stated the facts and the findings of Langton J., with which, his Lordship said, he agreed:] I cannot bring myself to agree to Langton J.'s apportionment of the respective degrees of fault. My mind has fluctuated between the view that the *Ceramic* should be held three quarters and the *Testbank* one quarter to blame and the view that the blame should be equally divided, but on the whole I think that this appeal should be allowed to the extent of varying the order below by substituting a declaration that both vessels were equally to blame.

Our attention was rightly directed to the dicta of Lord Sterndale M.R. and Scrutton L.J. in *The Karamea* (1). They expressed the view that where the judge below has apportioned the degrees of blame this court should be very slow to differ from him. Lord Sterndale M.R. said: "The Court of Appeal "will not lightly interfere with his discretion as to the "apportionment of blame," and Scrutton L.J. said: "It "would require an extremely strong case to alter the pro-"portions of blame which the judge below has attributed to "the ships." These are weighty dicta, but they are not part of the decision of the court in that case. I confess I

(1) [1921] P. 76, 78, 89.

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do not understand why the conclusion of the judge below can be said to be a matter in his "discretion," or how his decision differs from any other decision that is subject to appeal. His decision is a fulfilment of the duty imposed by the Maritime Conventions Act, 1911: "Where by the fault of two vessels "damage is caused, the liability to make good the damage "shall be in proportion to the degree in which each vessel "was in fault." The decision of those degrees was a novel duty imposed by that statute. A similar duty has been still more recently imposed by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, sub-s. 2: "In any "proceedings for contribution under this section the amount "of the contribution recoverable from any person shall be "such as shall be found by the court to be just and equitable "having regard to the extent of that person's responsibility "for the damage." If a judge has fulfilled the duty imposed on him by either of those Acts, and his judgment is the subject of an appeal, I confess I do not see why the Court of Appeal has not as full a power of reviewing his finding as in any other question on an appeal.

GODDARD L.J. [having stated the findings of fact:] After giving careful attention to the criticisms which have been made on the findings of the trial judge, I can only say that I am far from being convinced that he was wrong on any of the matters. Accordingly, his decision that both ships were to blame must stand, but now comes the question of the apportionment of blame between them. Mr. Pilcher has argued that we are precluded by the judgment of this court in *The Karamea* (1), from disturbing the judge's findings in this respect, contending, as I understand him, that there is here nothing exceptional. I need not repeat the passages from the judgments which have already been read by the Master of the Rolls.

The first observation I would make is that these passages are clearly obiter, but, considering the eminence of the judges who formed the court, it is with some diffidence that I venture

(1) [1921] P. 76.

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to be critical. I do not understand, however, why it is said that the apportionment of blame is a matter of discretion. It seems to me that, in deciding how much a ship is to blame for a collision, the court has to decide a question which is just as much one of fact as is the question whether she is to blame at all. It is, no doubt, true that one cannot apportion blame with anything approaching mathematical accuracy, but that is a familiar difficulty in cases where the damages are at large. In an ordinary accident case, there is no yardstick by which the court can measure the amount to be awarded for pain and suffering or ensuing disability. While this court does not readily interfere with the amount which a judge may award, and, indeed, has laid down certain principles with regard to the review of damages, it has, in recent times, not infrequently varied the amount awarded, either by way of increase or decrease. This apportionment, however, is a statutory obligation imposed by the Maritime Conventions Act, 1911, which also provides that, if the court cannot, in a case where both vessels are to blame, determine the respective degrees of responsibility, the damage is to be shared equally. If this court, therefore, is of opinion that the trial judge has taken a wrong view of the respective degrees of blame to be attributed to the colliding vessels, it has, in my opinion, not only the right, which the dicta in *The Karamea* (1) concede, but the duty to give effect to its opinion.

The effect of recent legislation has, I think, emphasized the necessity of this court retaining full liberty of action in this respect. Under the Law Reform (Married Women and Tortfeasors) Act, 1935, in the case of joint tortfeasors, the court has the duty of apportioning the liability among those defendants who are found to be liable, and this duty has to be performed by the judge although the case may be tried by a jury. There may well be cases in which the judge, if sitting alone, would have found for one of the defendants, but his view is not shared by the jury. In such a case the judge would naturally incline to place only a small part of the damages

(1) [1921] P. 76.

on that defendant. The other defendant ought to have the right of taking the opinion of an appellate court on the matter without being met with the objection that the apportionment is a matter of mere discretion. Clearly this court should not lightly disturb the apportionment made by the judge who has tried the case, but I see no reason why a finding on this subject should be regarded differently from any other question of fact found by him. In the present case the judge has assessed the responsibility of the *Testbank* at three times that of the *Ceramic*, but in the circumstances, I agree with my Lords that the damage should be shared equally.

Appeal allowed.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *Middleton, Lewis & Clarke.*

E. C. M. T.

THE ALBIONIC.

Shipping—Salvage—Abandonment—Constructive abandonment—Master and half of crew leaving burning ship—Claim by ship's officer against ship—Termination of contract of service.

The plaintiff, the wireless operator on the defendants' steamship A., claimed salvage for services rendered to the vessel after the master and half the crew had left her in circumstances which the plaintiff contended amounted to abandonment. The vessel had caught fire and the whole of her midships was either alight or threatened. The weather was bad and there was a rough sea. The heat of the fire bent the steering rods, and, as it was impossible to get into the engine room to shut off steam, the vessel was driving ahead in irregular circles and completely out of control. The master ordered the two ships' lifeboats to be lowered, and half the crew got into them, and he destroyed his secret documents and took the other ship's papers into one of the boats for preservation. Both boats broke adrift in the heavy sea, but, in the course of one of her circular turns, the A. came close to the boat in which the master was, and he shouted for all hands to jump overboard, adding that the boat would pick them up. The chief officer, however, who had assumed command on board,

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forbade the crew to jump. Thereafter, those left on board organized bucket parties to keep the flames from spreading, and, when the engines eventually stopped owing to lack of steam, anchored the ship which had driven dangerously near land. Later, a lifeboat arrived and offered to take off those on the ship. The chief officer gave every man the option of accepting the offer, but all on board agreed to remain. When the fire had burnt itself out and towage assistance arrived the plaintiff and those remaining on board rendered valuable assistance in getting the ship to port. Meanwhile, the master had been picked up by a steam drifter. He asked to be put back on board his ship, but, owing to his physical condition and the state of the weather, this was impracticable :—

Held, that to bring about the termination of a contract of service there must be abandonment of the ship on the orders of the master ; that on the facts it did not appear that any order to abandon was given, nor was the master's conduct sufficient to bring to the mind of the crew that they were to abandon the ship ; that, even assuming that an order had been given, it had not been complied with by half the crew, and, therefore, there was no abandonment ; and that when the plaintiff and the remainder of the crew performed the services they had not ceased to be bound by their contract of employment, and, therefore, were not entitled to be treated as volunteers with a right to claim salvage.

Judgment of Langton J. [1941] P. 99 affirmed.

APPEAL from Langton J. (1) in an action for salvage.

The plaintiff, the wireless operator on the defendant's steamship *Albionic*, claimed salvage for services rendered to the vessel after the master and half the crew had left her in circumstances which the plaintiff contended amounted to abandonment. The facts are summarized in the headnote and will be found fully set out in the report of the case in the court below. Langton J. found that a decision to abandon the ship had never been definitely taken by the master ; that there was no constructive abandonment ; and that, accordingly, the contract of service had not been dissolved and the claim for salvage failed. The plaintiff appealed.

Hayward K.C. and *Owen Bateson* for the appellant. The master abandoned the ship sine spe revertendi. It is not a necessary element of abandonment that everyone shall leave the ship : *The Le Jonet* (2). An order to abandon given bona fide is sufficient to dissolve the contract of service and

(1) [1941] P. 99. (2) (1872) L. R. 3 A. & E. 556.

no express words are necessary. The contract can be terminated either by discharge: *The Warrior* (1); or by action. The master never at any time said that he left the ship accidentally, there was ample justification for abandonment, and it is the state of mind of the master at the time that is material. He thought that the ship was a more dangerous place than the lifeboats, and if the boats had remained alongside and not broken adrift the rest of the crew would, no doubt, have got into them. They did not elect to go when the lifeboat offered to take them off, but, owing to their exertions, the ship was then at anchor in comparative safety and the fire was under control. If those remaining on board had left the ship, which the chief officer gave them the option of doing, clearly they could not have been sued for breach of their contract of service, and, therefore, they were volunteers and entitled to salvage. All the conditions laid down by Dr. Lushington in *The Florence* (2) as essential to the constitution of such an abandonment as to bring the subsequent services within the category of salvage services were fulfilled: see Kennedy's Law of Civil Salvage, 3rd ed., pp. 96–98. [Reference was also made to *The Portreath* (3).]

Sir Robert Aske K.C. and *Brightman* for the defendants. To discharge members of the crew of a ship from their contract of service and so entitle them to claim salvage as volunteers there must be either an express discharge or a physical abandonment of the ship sine spe revertendi by the master and substantially the whole of the crew. There cannot be a "constructive" abandonment. In the present case half the crew remained on board including the chief officer and other competent officers, and, therefore, there was no actual abandonment.

[MACKINNON L.J. referred to the observations of Lord Finlay L.C. in *Bradley* v. *H. Newsom, Sons & Co.* (4) on the question of what constitutes a derelict.]

Further, the master never gave an order to abandon the ship, nor had he definitely formed the intention of

(1) (1862) Lush. 476.
(2) (1852) 16 Jur. 572.
(3) [1923] P. 155.
(4) [1919] A. C. 16, 36.

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abandoning her. His hail to the crew to jump for the boats was merely advice and not an order, and it was not acted upon. [They were stopped.]

Hayward K.C. replied.

LORD GREENE M.R. The plaintiff and those associated with him in the events out of which this litigation arises performed what were obviously very gallant and very efficient services. As the reward for those services they must be content with the knowledge that they performed their duty in the best traditions of the service to which they belong, for the circumstances of the case, in my opinion, clearly make it impossible to take the view that when they performed those services they had ceased to be bound by their contract of employment and had become volunteers entitled to be treated as strangers to the ship, and, therefore, to pecuniary remuneration for salvage services.

Sir Robert Aske, in the forefront of his argument, disputed the proposition that where there is no de facto leaving of the ship by the master and all the crew, there can nevertheless be a constructive abandonment the effect of which is that the remaining members of the crew are discharged from their contract and are entitled to be treated as salvors. On the other hand, Mr. Hayward maintained that the order to abandon ship given by the master is sufficient of itself, if given bona fide, to dissolve the contract of service and put the members of the crew into the position of volunteers. In my opinion, the true view of the matter is that to bring about a termination of the contract of service there must be abandonment on the order of the master. The mere order of the master to abandon the ship, however, is not enough. Whether or not there has been abandonment must depend on the facts of each individual case. For instance, it is not to be supposed that, if the master and crew leave the ship with the exception of one man or two men, or possibly a handful of men, who owing to some special circumstances cannot get away or refuse to get away, there would not be an abandonment. In the present case, however, even

assuming that an order to abandon had been given, it was not complied with by about half the crew. How can that be an abandonment of the ship? Therefore, in my opinion, that ground alone would be sufficient to dispose of this appeal.

There is another ground which is equally fatal. No abandonment in fact is sufficient without an order of the master. In the present case I agree with the view which the learned judge took on the evidence that no order of the master to abandon was ever given. It is not to be thought that when I say there must be an order of the master, that order must of necessity be one given in so many words. One can conceive of cases where the conduct of the master may by itself be sufficient to bring to the mind of the crew that they are to abandon ship. In the present case there was no express order given by the master to abandon ship, nor was there anything in his behaviour which would lead properly to the inference that he was intending to convey to the mind of the crew that they were to abandon ship. If his own account be taken, when he left the ship and entered the port lifeboat he was doing so for the purely temporary purpose of putting the ship's papers in a place of safety and was intending to return. If a different view be taken of his intention, it appears to me that it must be that he had temporarily lost his head and that from his action no inference of an order could possibly be drawn. When I refer to the possibility of his having lost his head, it must not be taken that my words involve any reflection on the courage of a man who has subsequently lost his life in the service of his country. The medical evidence makes it clear that his health at that time was such that it was not unlikely that he would not have normal command of himself. Therefore, his actions, which, it is to be noticed, were only observed apparently by one or two members of the ship's company, could not justify in the mind of any man the inference that he was ordering the crew to abandon ship. If he had intended to give such an order, there was nothing in the circumstances to prevent him doing it. Having made no attempt to give any such

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order, all he did was to get into a boat, an act which was seen by one or two members of the crew. I should refer to one circumstance, namely, that apparently eight men got into the starboard boat. It is suggested from that that some inference can be drawn suggesting that an order had been given. There is no evidence of how those men came to be in that boat. The inference which I would draw from their presence in the boat is that there had been some breakdown of discipline. I am certainly not going to draw the inference that they were there in pursuance of orders given to them by the master. I am, therefore, unable to draw the conclusion that any order was given or that any order should be inferred from the conduct of the master. The result is that the men who remained in the ship did so in the ordinary discharge of their duty.

At a later stage the port lifeboat in which the master was seated and which he was commanding came close to the vessel, and he told the men to jump. The chief officer in his statement said that the master was obviously in a state of panic. The order was one which no sensible man could have been expected to obey in the circumstances, and the chief officer disregarded it as, in my opinion, he was entitled to do. That so-called order, so given by the master, was, in my view, as in the opinion of the learned judge, not an order in the ordinary sense of the word, but a piece of advice given to the men remaining on board for the sole purpose of saving their lives. It is not right to treat a suggestion of that kind, in the circumstances in which it was made, as an order which the men were bound to obey or as terminating their contract of service. If they thought that their lives were in greater safety by remaining on board, that was a matter for them to judge. If they decided that they were not going to take the risk of jumping into the sea and preferred to remain on board, the result is that they did not abandon the ship, but stood by her. In my opinion the appeal must be dismissed.

MACKINNON L.J. I agree.

GODDARD L.J. I agree.

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Appeal dismissed.

Solicitors for appellant: *Ingledew, Brown, Bennison & Garrett, for Lean & Lean, Cardiff.*

Solicitors for respondents: *Botterell & Roche.*

E. C. M. T.

READ *v.* READ.

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Divorce — practice — Service of petition — Dispensation — Respondent resident in Germany — "Enemy"—R. S. C., Or. IX., *r.* 14B—*Matrimonial Causes Rules*, 1937, *rr.* 10, 81.

R. S. C., Or. IX., r. 14B, which gives the court power in proceedings commenced by writ of summons or otherwise, to dispense with service on a defendant who is an "enemy" within the meaning of the Trading with the Enemy Act, 1939, does not apply to matrimonial causes. The Matrimonial Causes Rules, 1937, r. 81, provides that "subject to these rules or any statute" the Rules of the Supreme Court shall apply with the necessary modifications to the practice and procedure of any matrimonial cause or matter. In view of the words "subject to these rules" the peremptory provision of r. 10 of the Matrimonial Causes Rules, 1937, forbidding the trial of a petition unless the respondent has been duly served, either by personal or substituted service, prevents R. S. C., Or. IX., r. 14B, from applying. The fact that the Matrimonial Causes Act, 1857, s. 42, gives the court power to dispense with service in a proper case makes it necessary to read r. 10 as subject to the power conferred by that section, but it does not alter the position in regard to R. S. C., Or. IX., r. 14B. Further, R. S. C., Or. IX., r. 14B, is made subject to the right of the defendant to apply subsequently to set aside the judgment and such a provision is obviously inapplicable when a decree absolute of divorce has been made.

APPEAL from Hodson J.

On August 15, 1941, Richard George Read petitioned for the dissolution of his marriage with his wife, Margaret Brunhilda Read, on the ground of desertion. On November 17, 1941, he took out a summons under R. S. C., Or. IX., r. 14B, asking that service of the petition on the wife should be dispensed with on the ground that she was an "enemy" within the

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Trading with the Enemy Act, 1939, as being resident in Germany. Hodson J. held that Or. IX., r. 14B (1), was applicable to matrimonial causes by reason of the Matrimonial Causes Rules, 1937, r. 81 (2), and that the conditions of r. 14B had been complied with, but that the rule gave the court a discretion and that, in his view, service of the petition should not be dispensed with. The husband appealed. The appeal came before Lord Greene M.R. and Goddard L.J. on January 22, 1942, and it was dismissed on the ground that Or. IX., r. 14B, was not applicable to matrimonial causes. Subsequently, the attention of the court was drawn to the Matrimonial Causes Act, 1857, s. 42, and an order was made for the rehearing of the appeal.

(1) R. S. C., Or. IX., r. 14B (made on October 31, 1941), provides: "(1.) Subject to the provisions of this rule, the court or a judge may dispense with the service of a writ of summons or a notice of a writ of summons on any defendant who is an enemy within the meaning of the Trading with the Enemy Act, 1939, as amended by or under any enactment. (2.) An order shall not be made dispensing with service on any defendant under this rule unless—(*a*) the court or judge is satisfied that prompt personal service on such defendant is impossible or if effected could not be proved, and that the case is not one in which an application for an order for substituted service on such defendant ought to be made; and (*b*) the applicant produces to the court or judge a statement of claim signed by counsel and an affidavit showing that the applicant is entitled on merits to succeed in the action. (3.) Where in any action an order is made dispensing with service of the writ of summons or notice thereof on the defendant under this rule and judgment is given against him in the action, Or. XIII., r. 10, shall apply to the judgment as it applies to a judgment under the preceding rules of that order. (4.) This rule shall apply to proceedings other than actions commenced by writ of summons as it applies to actions commenced by writ of summons with the necessary modifications."

Or. XIII., r. 10, provides: "Where judgment is entered pursuant to any of the preceding rules of this order it shall be lawful for the court or a judge to set aside or vary such judgment upon such terms as may be just."

(2) Matrimonial Causes Rules, 1937, r. 81: "Subject to the provisions of these rules and of any statute, the Rules of the Supreme Court shall, notwithstanding the provisions of Or. LXVIII. thereof, apply with the necessary modifications to the practice and procedure in any matrimonial cause or matter to which these rules relate."

Percy Lamb (for *Conroy*, on war service) for the husband. The husband is entitled to an order dispensing with service of his petition for divorce under Or. IX., r. 14B, which by para. 4 is made applicable to proceedings commenced otherwise than by writ of summons. It is true that Or. LXVIII. excludes the application of Rules of the Supreme Court to matrimonial causes, but by r. 81 of the Matrimonial Causes Rules they are made applicable with necessary modifications. The Matrimonial Causes Act, 1857, s. 42, gives the court power to dispense with service. That section has never been repealed although ss. 41 and 43 were repealed by the Matrimonial Causes Rules, 1937, r. 82, under a power conferred by the Supreme Court of Judicature (Consolidation) Act, 1925. It follows that s. 42 cannot be treated as impliedly repealed by r. 10 and that service can be dispensed with in matrimonial proceedings. The rule must be read as applying except when service has been dispensed with. As regards the view previously taken that r. 14B could not apply because in the case of a decree absolute of divorce the power conferred on a defendant by para. 3 of that rule to apply to set aside the order could not apply, that is immaterial for the rest of the rule can and should be taken to apply. If the rule does apply, the discretion conferred by it should be exercised in favour of the husband.

LORD GREENE M.R. The argument has been concerned with the question whether or not Hodson J. was right in holding that R. S. C., Or. IX., r. 14B, applies to divorce proceedings by virtue of r. 81 of the Matrimonial Causes Rules, 1937. The matter was first argued before Goddard L.J. and myself on January 22 of this year. The court then took the view that Hodson J.'s judgment on that point was wrong and two reasons were given. The first was that the opening words of r. 81 : " Subject "to the provisions of these rules," directed a reference back to r. 10 of the Matrimonial Causes Rules, which on the face of it appears to be peremptory and to forbid the trial of a petition unless the respondent and every co-respondent thereto and every person named therein has entered an appearance or it

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has been shown by an affidavit that they have been duly served with the petition either personally or by substituted service. Accordingly, we formed the opinion that the words in r. 81 : " Subject to the provisions of these rules " forbade the application to matrimonial causes of a rule of the Supreme Court which gives power to dispense with service. Before the order of the court was completed our attention was drawn to the fact, which by an oversight had not been mentioned to us, that s. 42 of the Matrimonial Causes Act, 1857, gives power to the court to dispense with service, apparently on a respondent, " in case it shall seem necessary "or expedient so to do." When that section was called to our attention we thought it proper that we should hear further argument on the matter to ascertain whether knowledge of its existence would lead us either to change our view on the substance of the matter, or, at any rate, to express our reasons in different language.

Dealing, therefore, with the first of the two grounds on which the court relied on the previous occasion, the question arises whether or not the provision of s. 42 of the Act of 1857 by which service of a petition may be dispensed with is impliedly repealed by r. 10 of the Matrimonial Causes Rules, 1937. It is to be observed that the Rules Committee, or the authority which in war time takes their place, have power, under s. 99, sub-s. 1, paras. (*a*) and (*g*), of the Supreme Court of Judicature (Consolidation) Act, 1925, to make rules relating to procedure and to repeal any enactments dealing with matters with respect to which the rules are made. It was, therefore, competent to the rule-making authority to repeal s. 42, but in my opinion it has not done so. It is of great importance to notice that r. 82 of the Matrimonial Causes Rules, 1937, repeals ss. 41 and 43 of the Act of 1857, but makes no reference to s. 42, which it clearly leaves standing. If it had been intended to repeal s. 42 the repeal would, in my opinion, have been effected expressly by r. 82 and, therefore, I cannot construe r. 10 as impliedly repealing s. 42 or any part of it. It appears to me that r. 10 must be read as subject to, or being prefaced by a saving of, the power conferred by s. 42

to dispense with service in a proper case. Applying that conclusion to the question with which we are concerned, it must be observed that r. 81 only imports into the Matrimonial Causes Rules, 1937, a Rule of the Supreme Court subject to the provisions of the Matrimonial Causes Rules themselves. If r. 10 be read as prefaced by the words: "Subject and "without prejudice to the power conferred by s. 42 of the "Matrimonial Causes Act, 1857," or similar words, it still leaves that rule as peremptory in all cases save those to which s. 42 applies. The present is not such a case because the application is not made under that section, but under R. S. C., Or. IX., r. 14B. It appears to me, therefore, that, notwithstanding the existence of the power to dispense with service in s. 42, the words "subject to the provisions of these rules" in r. 81 prevent the importation of Or. IX., r. 14B.

The second ground on which it appeared to Goddard L.J. and myself that r. 14B could not apply to matrimonial causes was that para. 3 of the rule provides that where judgment is given against a defendant, service on whom has been dispensed with, R. S. C., Or. XIII., r. 10, shall apply so as to render the judgment liable to be set aside. The reason is obvious. Rule 14B involves a departure from what has always been a rule of our jurisprudence, namely, that constructive service is not recognized. Service must be personal or substituted, and on well-established principles substituted service can only be ordered where there is a reasonable probability that it will come to the notice of the person to be affected. The system of constructive service where a defendant can have judgment recovered against him without his having any opportunity of knowing that the proceedings are on foot is a thing against which English jurisprudence has always set its face, but, owing to the particular circumstances of the present war, it was found that a strict adherence to that rule would or might result in injustice to British subjects who wished to enforce their rights against enemies. The rule-making authority, however, was extremely careful to encircle this new procedure, so far as it was possible to do so, with safeguards directed to giving an opportunity of remedying any injustice which might take

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place. That is why a defendant against whom judgment has been obtained after dispensation of service on him under r. 14B has the right to come to the court and ask for the judgment to be set aside under Or. XIII., r. 10. That provision is an essential part of the rule which would never have been made without conferring on a defendant the right to come after the war, or earlier if he can, and have his case heard. It is not a mere accident or some collateral and subsidiary reason which led to the insertion in r. 14B of that paragraph. It is an essential part of the whole conception underlying the rule and a part of the justification for the departure by this rule from our long-standing system. Or. XIII. r. 10, never could apply to divorce proceedings, at any rate, where there has been a decree absolute, and, therefore, it would never be possible for a respondent against whom a decree absolute has been made without service of the proceedings, personal or substituted, to come to the court and have that decree set aside. The essential safeguard, therefore, could not be used for the protection of a respondent in divorce proceedings. On the face of it, therefore, it appears to me that the very subject-matter of r. 14B shows that it is a rule which is not intended to apply to divorce proceedings.

If that be the true view, what is the effect of r. 81 of the Matrimonial Causes Rules, 1937? Is it to be construed as importing into the Matrimonial Causes Rules a Rule of the Supreme Court which on the face of it is inapplicable to divorce proceedings? In my opinion, the answer to that question must be "No." It is argued by Mr. Lamb that para. 3 of r. 14B only applies in cases where it is possible for a party to come and ask the court to set aside an order, and that where by the very nature of the proceedings that is impossible the paragraph does not apply. In my opinion, that argument is ill-founded for the reason I have given, namely, that para. 3 is an essential part of the procedure provided and is not something which can be treated in the way in which Mr. Lamb would have us treat it. In the result, therefore, the appeal must be dismissed. We have not considered the question whether, assuming the rule did apply, a proper case for the exercise of discretion was,

contrary to the view of Hodson J., made out, and I express no opinion on that matter.

MACKINNON L.J. I agree.

GODDARD L.J. I agree. This application was based solely on Or. IX., r. 14B, and, for the reasons given by my Lord, I agree that that rule does not apply to divorce proceedings. Another reason, I think, why it does not apply is to be found in the proviso to s. 42 of the Act of 1857, which, as my Lord has pointed out, is still unrepealed and which provides that the court "may dispense with such service altogether in case it "shall seem necessary or expedient so to do." As the Rules of the Supreme Court are only applied to divorce proceedings subject to the provisions of the Matrimonial Causes Rules and of any statute, it seems to me that an additional reason for saying that r. 14B does not apply to matrimonial causes is that there was always power under that proviso for the court to dispense with service, probably the only case in our system in which service of proceedings may be dispensed with entirely. That power being there, there is no reason why the rule should apply to divorce cases. Indeed, it would still be open, I suppose, to the petitioner to make an originating application to the judge under the proviso to s. 42, although the position would not be very encouraging because we have been informed by the registrar that, so far as is known, in the 85 years in which the Matrimonial Causes Act, 1857, has been in force no order under that proviso has ever been made. It may be for that reason that none of the learned authors who have written voluminous text books on the subject of divorce appears even to mention it. I certainly did not know of it, and I mention this as a vindication of Mr. Lamb who did not call our attention to the proviso at the last hearing.

Appeal dismissed.

Solicitors: *Temple & Co.*

H. C. G.

1941
June 16;
Sept. 9;
Dec. 5, 16.

THE MARI CHANDRIS.

Shipping—Salvage—Harbour dues—Arrest of defendant's ship by Admiralty Marshal at instance of plaintiffs—Ship moved to harbour by order of Admiralty—Order of court that ship be dismantled and proceeds paid into court—Ship abandoned by defendants to underwriters—Plaintiffs paid salvage award by underwriters—Intervention by harbour authority for dock dues—Substantive rights not determinable on motion.

The plaintiffs instructed the Admiralty Marshal to arrest the defendant's ship in an action of salvage. She was then at Falmouth, but was subsequently moved by Admiralty orders to St. Mawes. The defendants abandoned the ship to their underwriters, who paid the plaintiffs the amount of a salvage award made by the court. Meanwhile, the court had made an order for the vessel to be handed over to the Ministry of Shipping to be dismantled and the proceeds paid into court. The proceeds were insufficient to pay the St. Mawes Harbour Co. their dock dues, and they accordingly intervened in the action and set down a motion asking that the order for handing over the vessel to the Ministry of Shipping should be set aside and for such other order as might be just, which they contended was that the plaintiffs should be ordered to pay the dues as persons "having the control of the vessel" under s. 19 of the St. Mawes Pier and Harbour Act, 1854:—

Held, that procedure by motion could not be employed to determine substantive rights, and that the question whether the plaintiffs could be held liable for the dues could only be determined in an action to determine that issue.

Held, further, however, that if hereafter there were sufficient funds in the hands of the marshal, from the sale of the assets, the interveners were entitled to be paid their dues.

Quaere whether the Admiralty Marshal can be in control of a vessel as agent of the persons arresting her or whether he is not solely the agent of the Admiralty Court.

MOTION by the St. Mawes Pier & Harbour Co., as interveners, to set aside an order of the court made in a salvage action in which the plaintiffs, the owners of the steamship *Algerian*, claimed salvage from the defendants, the owners of the steamship *Mari Chandris*, and for such other order as might be just.

In June, 1940, the plaintiffs rendered salvage service to the *Mari Chandris*, which had been in collision, and she was brought into Falmouth Bay and there arrested by the Admiralty Marshal at the instance of the plaintiffs. In July, 1940, having been further injured by enemy action at Falmouth, the *Mari Chandris* was brought on Admiralty orders to St. Mawes Harbour and put on the ground. On November 29,

1940, the court ordered the vessel to be handed over to the Ministry of Shipping to dismantle, the scrap metal to be recovered and the proceeds paid into court. At the time of the hearing of the motion the vessel had been taken outside the harbour precincts and was in an advanced stage of disintegration. The owners of the *Mari Chandris* had abandoned to their underwriters all interest in the vessel before she was brought into the harbour and the salvage award of 1500*l.* which was made on March 24, 1941, was made in default of appearance. On May 13, 1941, the St. Mawes Pier and Harbour Co. obtained leave to intervene in the action to obtain payment for their harbour dues. The underwriters of the owners of the *Mari Chandris* declined to assume any responsibility towards the wreck, but discharged their liability to the plaintiffs under the judgment of the court for the 1500*l.* At the time of the hearing of the present motion, what remained of the vessel was still under arrest, but there were no sufficient funds in the hands of the court resulting from the sale of her material to satisfy the dock dues.

Porges for the interveners. The interveners want their statutory right to recover harbour dues protected. By s. 19 of the St. Mawes Pier and Harbour Act, 1854 (17 Vict. c. lvi.), the persons "having the control" of the vessel were liable for these dues. The plaintiffs took control by arresting the ship and she must have been moved from Falmouth to St. Mawes by the Admiralty on behalf of the plaintiffs, who are the only persons who have benefited from her detention.

Owen Bateson for the plaintiffs. All that the plaintiffs did was to arrest the ship at Falmouth. They did not order or want her to be removed to St. Mawes. They have been paid and should be released from the action. If the interveners wish to establish that the plaintiffs are liable for these dues they must bring an action, the question cannot be decided on this motion. The interveners have the right to detain the vessel under the Harbours, Docks and Piers Clauses Act, 1847.

Cur. adv. vult.

Dec. 16. LANGTON J. read the following judgment. Clearly the owners of the *Mari Chandris* cannot be called on to satisfy the claim of the interveners since they had abandoned all interest in the vessel before she was brought into the harbour.

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Langton J.

Equally the underwriters, who are not parties to the action, and not before the court, could hardly be ordered to pay the dues. Mr. Bateson argued that the only power reserved to the interveners was the somewhat cold comfort which they might obtain from the Harbours, Docks and Piers Clauses Act, 1847, by way of detaining a vessel to satisfy dues. I have now procured a copy of the private Act of June 2, 1854, whereby the company was incorporated. It is clear from s. 19 of that Act that the company has a power to recover rates and dues properly levied from the persons mentioned in that section. The wording, so far as material, runs: "That there shall be "paid to the company by the owner, captain, master, or other "person having the control of any vessel . . . . any sum ". . . . not exceeding the rates mentioned in the schedule ". . . ." Ex concessis the plaintiffs cannot be regarded as either the owner, captain, or master. It remains to be considered whether they can and ought to be made liable under the further category of "person having the control of "the vessel."

It is clear that the Admiralty authorities had the actual control of the ship when she was brought into St. Mawes Harbour. In law it appears to me at least probable that the Admiralty Marshal had, strictly speaking, the control, and it is suggested by Mr. Porges that the Marshal was in control as agent for the plaintiffs because he had been put in possession at their instance for their benefit. This contention raises the interesting and rather considerable point whether the Admiralty Marshal could ever be properly regarded as the agent of any private individual. Without attempting to determine it I will only say that the first inclination of my mind is towards the belief that the Admiralty Marshal is the agent of the Admiralty Court, and acts for and on behalf of the court and is not in law the agent of anybody else.

I have put this interesting point aside because I am of opinion that there is a clearer and more simple objection to the interveners' contention, which is insurmountable. Mr. Bateson was, as it seems to me, on unassailable ground when he said in the familiar formula of valedictory orations "this "is not the time nor this the place" in which the matter raised could be either fully considered or fully determined. The procedure by motion in this court, by which rival contentions, supported by affidavits, are determined, is a speedy and convenient method for dealing with matters such as

priorities, etc., where substantive rights are not in issue. It cannot, however, be employed, save by the consent of the parties, as the method of determining a right which can only be finally ascertained by an action. I express no opinion whether the plaintiffs could properly be held liable for these dues in an action brought to determine that issue. I must, I think, content myself with saying that the point is demonstrably an arguable one, and that no authority has been cited to me which throws light on this question. Accordingly, somewhat to my regret, I must decline to make the order asked for on this motion, and leave the interveners to pursue any remedy to which they may be entitled in the appropriate forum. Without prejudice, however, to any such action on their part, I think that I have both the power and the duty to offer them a small meed of consolation. If and when the recoveries from the *Mari Chandris* produce in the hands of the marshal a sufficient sum to cover the dues of the interveners I think that they are entitled to be paid that sum, and I direct the marshal to make such payment accordingly.

Solicitors for plaintiffs : *Hill, Dickinson & Co.*
Solicitors for interveners : *Thomas Cooper & Co.*

E. C. M. T.

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1942
Feb. 12, 26.

Divorce—Desertion—Separation order—Discharge—Revival of desertion—Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2 (*b*).

On December 18, 1931, justices granted to a wife a maintenance order against her husband on the ground of his desertion of her on July 27, 1931, and his wilful neglect to maintain her, and they further ordered that the wife be no longer bound to cohabit with the husband. The wife desired only an order for maintenance and not a separation order, but she was aware that the order which she had been granted contained a non-cohabitation clause. On April 22, 1932, the order was varied at the instance of the wife, the amount of the maintenance being increased, but no application was then made to strike out the non-cohabitation clause. No attempt was made by either spouse to resume cohabitation. On June 10, 1938, the justices, on the application of the wife, ordered that the non-cohabitation clause "be no "longer of effect and shall be from henceforth deleted from "the said order," the ground being that since the making of the

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order the husband had never resumed, or attempted to resume, cohabitation and that the wife wished to obtain a divorce from him on the ground of desertion after the expiration of the following three years. It was proved that the husband had been served with the proceedings. On June 18, 1941, the wife presented a petition for divorce from her husband on the ground of his desertion for a period of at least three years preceding that date. The wife stated in evidence that, although she knew that so long as the original order subsisted she was not obliged to take her husband back, she would nevertheless have been willing to do so, if he had made any overtures to her before she applied for the amendment of the order in 1938: but that after she obtained the original order she herself never offered to take him back because she "had tried so hard before that"; and that the real trouble was that there had been another woman in the husband's life from the time of the original desertion, but no more specific evidence on this point was given. She also said that by 1938, when she applied for the amendment of the order, she had no intention of taking him back "after those many years."

Held, on the facts, that the petitioner was entitled to a decree, but *semble* desertion of the husband was not automatically reconstituted by the mere deletion of the non-cohabitation clause from the order, in view of the fact that the separation order had been in full force and effect for so many years without any overtures on the part of the wife for a resumption of cohabitation or evidence of conduct by the husband explaining why she had not done so, more especially as the express object of the deletion of the clause was not to facilitate the resumption of cohabitation but to enable the wife to obtain a divorce after the lapse of a further period of three years.

WIFE'S undefended petition for divorce.

The facts are sufficiently stated in the headnote.

C. A. Marshall Reynolds for petitioner.

Cur. adv. vult.

1942. Feb. 26. THE PRESIDENT (LORD MERRIMAN) read a judgment in which he stated the facts as set out, and continued: It is quite clear, and I so hold, that the husband deserted the wife in 1931. It is equally clear that the desertion ceased to run on the making of the separation and maintenance order in December, 1931. It is not suggested that no separation order was in fact made, as in *Cooper* v. *Cooper* (1). It is possible that it was made by inadvertence, in the sense that it was made in disregard of the warning given in *Harriman* v. *Harriman* (2), and in many other similar cases. But this

(1) [1940] P. 204. (2) [1909] P. 123.

was not the ground put forward for varying the order in 1938, and, indeed, it would not have been easy to put forward this contention after the original order had been relied on by the wife to obtain a variation of the maintenance in her favour.

The wife's case before me was based solely on the ground that the variation of the order in 1938 by deleting the non-cohabitation clause was, of itself, sufficient to reconstitute desertion. But after so long an interruption, I do not think that the usual presumption of the continuity of desertion arises, and it seems to me that the effect of the deletion of such a clause on the quality of the separation between the spouses must depend on the circumstances of the case, including the length of time during which the separation order has been in force and the conduct of the parties meanwhile. I should find it difficult to hold, after a separation order has been in full force and effect for many years, and without any overtures on the wife's part towards a resumption of cohabitation or any evidence of the husband's conduct to explain her not making any, that desertion, while again becoming possible, is automatically reconstituted by the mere deletion of a non-cohabitation clause from the order, more especially when the express object of the variation is not to facilitate a resumption of cohabitation but to enable the wife to obtain a divorce after the lapse of a further period of three years, a form of application which might tend rather to induce a husband to stay away in the hope of obtaining his freedom than to resume cohabitation.

It is true that in *Boulton* v. *Boulton* (1) Horridge J. held that similar procedure enabled a wife to prove desertion which, coupled with adultery, entitled her to a decree of divorce, but in that case no reasons were given for the decision, and as the amendment of the order was made in the husband's presence, it may have been made, at the time, rather with a view to the reconciliation of the parties, who had only been married in the year preceding the original order, than for the sole purpose of reconstituting desertion. In *Mackenzie* v. *Mackenzie* (2), the Court of Appeal, holding that the existence of a separation order during the three years immediately preceding the presentation of the petition precluded the wife from alleging desertion for the statutory period prescribed by the Matrimonial Causes Act, 1937, discussed the possibility

(1) [1922] P. 229. (2) [1940] P. 81.

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of adjourning the petition so that the justices might strike out the non-cohabitation clause with retroactive effect. This suggestion was not pursued, but it appears to have been assumed that no difficulty would have arisen if the clause had been struck out before the currency of the statutory period. But it was also assumed that the non-cohabitation clause had been left in the order by inadvertence, that is, in the sense that it was included carelessly in disregard of the warning in *Harriman* v. *Harriman* (1), and there was nothing in that case comparable to the subsequent ratification of the order which occurred in this case.

On the other hand, the mere fact that, in a certain event, the wife in applying for a variation contemplates the reconstitution of desertion with a view to divorce cannot, of itself, be fatal. The analogy to a suit for the restitution of conjugal rights is not complete, since to entitle a wife to such a decree she must be prepared to satisfy the court that she is genuinely desirous of resuming cohabitation. If so, the fact that she may contemplate founding divorce proceedings in the event of the husband's non-compliance with the order is no answer to a petition for restitution: *Palmer* v. *Palmer* (2).

From the moment when the non-cohabitation clause is deleted from an order a husband could demand resumption of cohabitation unless there was something in his previous conduct which would justify the wife in refusing to resume cohabitation at all, or to refuse to do so unless she were given reasonable assurance that whatever misconduct, other than mere desertion, had given just cause of complaint would not be repeated. Manifestly, if there was nothing more than mere desertion the bare lapse of time would be no bar to the husband's overtures, for that would be accounted for by the existence of the order. In the event, therefore, of a genuine attempt by this husband to resume cohabitation after the deletion of the non-cohabitation clause from the order the wife would either have been obliged to comply or to justify her refusal by some grave and weighty reason.

One may fairly apply to the variation of the order the observations of Lord Merrivale P. on a restitution decree in *Palmer* v. *Palmer* (3): "The making of the decree if it has "its proper legal effect of a return to cohabitation on the "part of the husband will be an impediment to her right

(1) [1909] P. 123.
(2) [1923] P. 180.
(3) [1923] P. 180, 183.

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"subsequently to apply for a divorce on any ground now known "to her." In other words, even though the wife may not have desired it, she took the risk of bringing about a state of things in which she might have been obliged to resume cohabitation. But though the husband was served with the proceedings he has made no attempt to resume cohabitation, and, having regard to the fact that I feel myself able to place implicit reliance on the wife's evidence, although it was deficient in particularity, I am prepared to hold that this is not merely because the wife announced her hope of obtaining a divorce but because there were very good reasons which debarred him from doing so.

Therefore, although I think that the case is very near the line, I am prepared to pronounce a decree nisi, but I hope that I have said enough to make it clear that, in my opinion, a petitioner takes a risk if she relies solely on such a variation of a separation order without being prepared to give evidence of other facts from which the court can infer that, after the variation, desertion has been constituted afresh, and has continued for the statutory period.

Solicitor: *J. C. L. Sharman.*

W. L.

Fisher v. *Fisher* - - - [1942] P. 101
Applied. HASTING *v.* HASTING
[1948] P. 68

FISHER *v.* FISHER.

C. A.
1942
Mar. 5.

Divorce — Maintenance — No application at time of decree — Alimony continued by husband for seven years—Subsequent application for leave to apply for maintenance—Jurisdiction of court to grant leave—Special circumstances—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-s.* 1—*Matrimonial Causes Rules*, 1937 (*St. R. & O.*, 1937, *No.* 1113), *r.* 44.

A wife who had obtained a decree for dissolution of marriage in 1934, relying on a continuance of alimony paid by her former husband and his undertaking to settle certain property on her, made no application to the court for permanent maintenance until 1941, when all payments to her and negotiations for a settlement had come to an end:—

Held, that in the circumstances the wife ought to be given leave to apply to the court for an order for permanent maintenance.

Scott v. *Scott* [1921] P. 119 distinguished.

Decision of Henn Collins J. reversed (Goddard L.J. dubitante).

Observations of Lord Greene M.R. in *Mills* v. *Mills* [1940] P. at p. 130 explained.

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APPEAL from a decision of Henn Collins J., refusing a wife's application for leave to apply for permanent maintenance after divorce.

In March, 1934, the wife obtained a decree nisi for dissolution of her marriage, and in October, 1934, the decree was made absolute. An order had been made for the payment by the husband of 325*l.* a year (free of tax) alimony pendente lite for the wife and the child of the marriage. After the decree absolute the husband continued to make the same payment to the wife until May, 1940.

The payments then became irregular and after May, 1941, they stopped and, to maintain herself, the wife had to draw on her capital of about 1000*l.*, she being fifty-nine years of age and unable to earn her living. These facts were before Henn Collins J. when he made the order, but the following further facts were put in evidence before the Court of Appeal in an affidavit by the wife's solicitor. He said that he had known the husband for over twenty years, and for a long time had been in the habit of discussing with him the question of a settlement on the wife, a proposal for which was signed by the husband at the time of the decree absolute. He proposed to convey certain property to her, subject to a mortgage, the interest on which he agreed to pay and which he agreed to redeem within three years. This proposal was not accepted by the wife as she would not take over a mortgaged property, and the husband would not agree to redeem it immediately. Other suggestions were made and were frequently discussed up to the time when the payment of alimony ceased, but the parties never came to any final agreement. The solicitor said that he regarded the intention of the husband to make the settlement as sincere and he did not wish to take any action which might antagonize the husband and further delay the execution of a settlement. In reliance on the payments of alimony and the negotiations for a settlement the wife made no application for permanent maintenance. After payments by the husband had ceased she applied under r. 44 of the Matrimonial Causes Rules, 1937 (1),

(1) By Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 1: "The court may, "if it thinks fit, on any decree for "divorce . . . . order that the "husband shall, to the satisfaction "of the court, secure to the wife "such gross sum of money or "annual sum of money for any "term, not exceeding her life, as "having regard to her fortune, if "any, to the ability of her "husband and to the conduct of "the parties, the court may deem

for leave to make an application for permanent maintenance.

Henn Collins J. refused leave, and the wife appealed.

Harold Brown for the wife. Although seven years have elapsed since the decree absolute, there are reasonable grounds for asking for leave to apply for maintenance. The wife was reluctant to do so, so long as she was getting a regular allowance of 325*l.* from the husband, and she was also relying on his undertaking to settle property on her which he never carried into effect. *Scott* v. *Scott* (1) is distinguishable on the facts. The wife there only made the application because the husband's income had increased, and he was better off than she had believed. No delay is too long if the wife has a relevant case for applying for maintenance: *Legge* v. *Legge* (2), where leave was given after four years' delay; *Mills* v. *Mills* (3) is distinguishable.

The husband did not appear.

LORD GREENE M.R. The first question which arises depends on the effect to be given to s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, which re-enacts, so far as is relevant for the present circumstances, the provisions of earlier statutes. The present application is for leave to make an application under s. 190, sub-s. 1, and if under that section the court has no jurisdiction to entertain it, the matter ought to be stopped in limine by refusing the leave to make the application which is being asked for under r. 44. The question whether or not, in the circumstances of this case, the court would have under s. 190, sub-s. 1, jurisdiction to order permanent maintenance is the principal matter which has been discussed before us. Before I examine that problem it must be borne in mind that, if the court is minded to allow this appeal, all that it will be doing will be giving permission to the making of an application

"to be reasonable . . . ."

By the Matrimonial Causes Rules, 1937, r. 44, sub-r. 1: "An application for maintenance, "... in the case of proceedings "for divorce may be made by the "petitioner at any time after the "time for entering an appearance "to the petition has expired, and "by a respondent spouse at any "time after entering an appear- "ance to the petition, but no "application shall be made later "than one month after final "decree except by leave of a "judge."

(1) [1921] P. 107.

(2) (1929) 45 T. L. R. 157

(3) [1940] P. 124.

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for permanent maintenance. It will not be dealing in any way with the merits of such an application, nor will it be tying the hands of the judge before whom the application comes. He will consider whether it is right and proper that any order should be made, and, if so, what that order should be. The husband, therefore, will have every opportunity of putting his case on the merits before the court.

I now turn to the substantial question whether or not, in the circumstances of this case, the court could entertain an application under s. 190, sub-s. 1. The meaning of the words "The court may . . . . on any decree for divorce," the crucial word being the word " on," has been authoritatively settled by a decision of this court in *Scott* v. *Scott* (1). The words mean, according to the construction then placed on them, that the application must be made " at " or " within a reasonable time " after the decree having regard to all the circumstances of the case. As I understand it, in the present case the learned judge took the view that the application would not be made within a reasonable time in the circumstances of this case, over seven years having elapsed between the date of the decree absolute and the date of the application. I should be very loth to interfere with the discretion of the learned judge on a matter of this kind if I had not before me material which was not before him. In view of the additional evidence which has been placed before this court, it is, I think, fair to regard the wife as having been lulled into a sense of security by what had taken place. When I use that expression, it is not to be thought that I am casting any imputation on the husband or suggesting that anything which he did was in any way improper. The impression which I get is that both these parties were behaving in a very decent and proper way towards one another, the husband really anxious to make a provision and the wife anxious to have one, but the matter being rather allowed to go to sleep because the wife was receiving the payments regularly from the husband. When the payments have come to an end, and the whole situation has thus changed, it seems to me that it would be unfortunate, to say the least of it, if the wife had to be stopped in limine from obtaining an order which would enable her to have her application decided on its merits. Although I agree that it is a matter on which different minds might take different views, it seems to me that an application now made for permanent maintenance could properly be said

(1) [1921] P. 107.

to be an application made within a reasonable time after the decree nisi having regard to all the circumstances of the case.

It may, of course, be said that the wife should have broken off negotiations and taken the step of applying to the court at a much earlier stage. It is true that she might have done that, but I always feel that the court in domestic matters should be slow to take any course which would discourage the parties from negotiating and discussing matters in a friendly way, instead of rushing into litigation with one another. Even if they have been divorced, it is not desirable that they should always be having recourse to the courts if there is a reasonable chance of their being able to compose matters outside. That applies more particularly if there is, as there was in the present case, an infant child of the marriage. Therefore, looking at the whole of the facts, I think that we are justified, having regard to the new evidence before us, in coming to a different conclusion to that to which the learned judge came.

I must say a word with regard to two decisions. The first is *Scott* v. *Scott* (1), where the decree absolute was made in 1913 and the application for maintenance in November, 1919. It was held there that the time within which it was proposed to make the application was not a reasonable time, but the facts were very different to those of the present case. There the wife was in enjoyment of 500*l.* a year paid to her by her husband under what may have been a contract or what may have been merely a friendly arrangement—this court did not decide which it was—but for practical purposes it made no difference. The husband was willing to increase that sum, but she wanted a very much larger amount. Before she could get that larger sum, she had to get an order for permanent maintenance and the court refused to regard her application as made in good time having regard to the circumstances. As Lord Sterndale M.R. points out (2): "It was rightly said, I think, that "in substance what the wife is seeking to do is to obtain an "increase to the sum of 500*l.* a year payable to her." There was no reason to suppose that the 500*l.* would come to an end. All she was trying to do was to extract something more. The court clearly refrained from suggesting that the time which had elapsed in that case, which was a matter of six years, would have been a conclusive answer to an application in different circumstances. Both Warrington L.J. and Scrutton L.J. (and, I think, Lord Sterndale M.R.) framed their conclusions in very

(1) [1921] P. 107. (2) [1921] P. 119.

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careful language. Scrutton L.J. expressed his conclusion where he said (1): "Without going through the other cases, "seven or eight of which I have referred to while counsel have "been arguing this case, I think in this particular case the "application ought to have been made within a reasonable "time after the decree for dissolution, and I see nothing "whatever in the circumstances of this case to justify an "application being made seven years after the decree." He carefully refrained from saying that in any circumstances seven years would have been too long. Warrington L.J. is equally cautious in the language which he used. It seems to me that that authority does not in any way preclude us from saying that, on the facts of any particular case, a reasonable time may be as much as seven years or even longer.

That leads me to add a word or two, merely to explain some observations of my own, about *Mills* v. *Mills* (2). I there said, in reference to the case that was before the court (3): "If the present application had been a new application made "in the year 1940 in reference to a decree of divorce which "was made absolute in November, 1932, it could not, in "my opinion, be suggested for one moment that the court "would have had jurisdiction to deal with the application. "An order made on an application launched so many years "afterwards would not have been an order made on a decree "for divorce." Later in the judgment there are phrases to the same effect. It must not be thought that I was assuming any more than the bald circumstances which I stated, namely, a decree of divorce in 1932 and an application eight years afterwards, without any further facts. I adhere to what I said there. If that were all the court had to consider it is obvious that there would be no special circumstances which would render that a reasonable time. My language must not be construed as suggesting that there was any sort of cast-iron period which could be laid down. That becomes particularly clear, because just before the passage I have read I had quoted *Scott* v. *Scott* (4), in which it is laid down with great clearness that all the circumstances of the case must be considered.

I have given very anxious thought to this case, which is a difficult one, but I think that, having regard to the facts which I have mentioned, it would be within the jurisdiction of the

(1) [1921] P. 126.
(2) [1940] P. 124.
(3) [1940] P. 130.
(4) [1921] P. 107.

court under s. 190, sub-s. 1, of the Act of 1925, to entertain the application, and I think the case is one in which the court ought to grant leave to make it under the relevant rule. In my opinion, therefore, the appeal should be allowed.

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MACKINNON L.J. I agree.

GODDARD L.J. As both my Lords are of opinion that there are circumstances in this case which make it reasonable that the wife should be entitled to make her application, I should feel a difficulty in dissenting, but I must say that I only agree with considerable doubt and hesitation. The lapse of time is a very long one. The wife has not been bereft of advice, as was the fact in *Legge* v. *Legge* (1). She has been in her solicitor's hands the whole time. However, as I am not dissenting, I do not propose to state at length the doubts and difficulties which I have felt and still feel on the whole case, especially, as my Lord has pointed out, and I entirely agree, that the fact that we are giving leave to make this application still leaves the judge before whom it comes an entirely free hand as to what order, if any, he makes on it. I will add no more, because I do not want to say anything which would indicate to him a view on a matter which is eminently one for his discretion. Therefore, while I have great doubt on the matter, I will not dissent from the order which my Lord has proposed.

Solicitors for wife: *Charles J. Pack & Son.*

(1) 45 T. L. R. 157.

Explained. VINEY v. VINEY. [1951] 2 All E.R. 204.

H. L. L.

Dictum of LORD MERRIMAN, P., at p. 109, *approved.* COOK v. COOK. [1949] 1 All E.R. 384.

Followed. BARTRAM v. BARTRAM [1950] P. 1

Applied. WHITNEY v. WHITNEY [1951] P. 250

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1942 *Mar.* 18.

Divorce — Desertion — Termination — Resumption of cohabitation — Condonation—Single act of intercourse—No intention of husband to return to wife—Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2.

Applied. LOWRY v. LOWRY [1952] P. 252

A husband deserted his wife in 1937. On a single occasion in or about June, 1940, he spent a night with her and marital intercourse took place. She hoped that married life would be resumed, but he had no intention of returning to her, and left her next morning and did not return. On April 22, 1941, she petitioned

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Distinguished. VINEY v. VINEY [1951] P. 457

for a divorce on the ground of his desertion for a period of at least three years immediately preceding that date :—

Held, that in the circumstances the single occasion of marital intercourse did not operate as condonation of the desertion before June, 1940, and did not break the continuous desertion for upwards of three years immediately preceding the presentation of the petition.

Rowell v. *Rowell* [1900] 1 Q. B. 9 applied.

UNDEFENDED petition for divorce.

In her petition dated April 22, 1941, Kathleen Wyer Mummery prayed for divorce on the ground that her husband, Norman Mummery, had deserted her for a period of at least three years immediately preceding the presentation of the petition. From the early days of the marriage, which took place on April 25, 1931, at Stroud Green parish church, London, the husband was inattentive to the wife and spent much time away from her. In 1936 he avowed that he was interested in another woman whom he brought to stay at the matrimonial home against the wife's wishes. Consequently the wife left home. The husband did not supply her with money, and continued to associate with the other woman. In 1937 he told his wife that he wanted a divorce at the earliest possible moment. When war began in September, 1939, the husband became an ambulance driver and went with his unit to France. He was evacuated in the retreat from Dunkirk, and on his arrival in England he telephoned to his wife, and said : "I will look in and see you on my "way to my grandmother's." He did not express any intention at that time of coming to stay with her. In the course of dinner together the husband said, "I will stay the night, if you like," and the wife agreed as she hoped that the husband would repent and make a home with her, and she acted as she did to effect a reconciliation. She did not suggest that the husband did or said anything actively to deceive her in asking that he should be allowed to stay the night. They spent the night together and next morning the wife invited her husband to resume married life and to settle down. He said, "Don't be an idiot. It does "not follow that because a man stays with you he is going to "love you again," and thereupon he left her, never to return to her. On March 26, 1941, as a preliminary to the bringing of this petition she wrote to him a letter in which she said : "When you came back from France and I stayed with you

"that night at the 'White Horse' I felt so sure that this would "be a beginning, but you went off again the next morning "apparently quite unconcerned about my feelings." He replied on March 31: "To be quite frank with you, it has never been "in my mind to settle down again."

Holroyd Pearce for the petitioner.

THE PRESIDENT (LORD MERRIMAN). The question which I have to determine is whether there was such an interruption of the desertion as to prevent the wife from saying that she had been deserted for three years immediately preceding April 22, 1941. A resumption of cohabitation in the full sense of the word puts an end to a state of desertion, and that not merely because it condones the previous desertion for whatever time that offence has lasted, but also because a resumption of cohabitation is the exact negation of a state of desertion. The two things cannot exist together. It is clear that, apart from whatever may be the legal effect of what happened on the night which the husband and the wife spent together, the husband had not the slightest intention of resuming cohabitation in the ordinary sense of the word, and on any view of the matter, even assuming that I am bound to hold that cohabitation was resumed or that the offence had been condoned on that occasion, it is plain that the husband resumed a state of desertion the next day. Did the fact that the husband and wife for that night resumed marital relations in the usual sense constitute a resumption of cohabitation so as to condone the previous desertion and bring the state of desertion to an end? If the fact that sexual intercourse took place between the parties is conclusive, there is nothing more to be said. The wife does not suggest that her consent to that act was obtained by fraud, so that the issue raised in *Roberts* v. *Roberts and Temple* (1) does not arise. The whole question turns on what a resumption of cohabitation means. Lord Merrivale said more than once that no judge has ever attempted to give a comprehensive definition of desertion and that probably no judge would ever succeed in doing so, but among the descriptions of desertion which he gave was one which has always appealed to me. He said that desertion was a withdrawal not from a place, but from a state of things: *Pulford* v. *Pulford* (2). Similarly, I doubt whether any

(1) (1917) 33 T. L. R. 333. (2) [1923] P. 18, 21.

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judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so, but at least a resumption of cohabitation must mean resuming a state of things, that is to say, setting up a matrimonial home together, and that involves a bi-lateral intention on the part of both spouses so to do.

Does intercourse on a single night in the circumstances of this case raise an irrebuttable presumption that the parties have resumed cohabitation even for that brief time? Put in another way, does it raise an irrebuttable presumption that the wife, in consenting to that intercourse, has condoned the previous desertion? I think it would lead to an absurd state of things if one were bound so to hold. Clearly, it can be nothing but praiseworthy on the part of a deserted wife to make every legitimate attempt to regain her husband's affection, company and support; and obviously the fact that during a period of desertion the parties met by arrangement to talk over their difficulties and the deserted wife did her best to persuade her husband to return to her while he remained obdurate, would not compel the court to hold, however protracted the meetings and even if they involved the parties spending the night or several nights under the same roof, that the state of desertion was brought to an end. Why then should a wife who goes a step further in the hope of effecting a reconciliation and allows her husband to sleep the night with her be held to have condoned the offence and to have resumed cohabitation when it is clear beyond doubt that the husband had no intention of resuming cohabitation? I do not think that I am obliged so to hold. In my view, the law is that, as regards the wife at any rate, an act of sexual intercourse is not conclusive on the question of condonation, and that it does not raise an irrebuttable presumption that cohabitation has been resumed.

I think that I am justified in so holding, if not obliged so to hold, on the authority of *Rowell* v. *Rowell* (1). That case raised a question whether or not three or four casual and intermittent acts of sexual intercourse had amounted to a resumption of cohabitation so as to put an end to a deed of separation. That case did not raise precisely the same question as here, for it is quite possible to enter into a deed of separation in a form which does not necessarily involve that the parties will even remain husband and wife, but it is settled law that resumption

(1) [1900] 1 Q. B. 9.

of cohabitation puts an end to a deed of separation in the ordinary form. In *Rowell* v. *Rowell* (1) there was argument as to the effect of the deed, but once the court decided to treat it merely as an ordinary deed of separation, the sole question was whether casual acts of intercourse had or had not amounted to a resumption of cohabitation. On that issue Lord Russell of Killowen C.J. said (2): "In my judgment, if the court "comes to the conclusion that there was an intention by "both parties to come together again, there would be an "end of the deed." Let it be observed that he stressed intention, and said that it must be the intention of both parties which puts an end to the deed. Dealing with the acts of intercourse, he said: "I agree that such acts are "strong evidence unless explained; but it is not a necessary "conclusion from them that it was intended to put an end to "the deed of separation." I think that I am entitled to interpret that passage as meaning that it is not a necessary conclusion from them that both parties intended to resume cohabitation. A. L. Smith L.J. said (3): "I agree that the "proof of intercourse between the parties if unexplained is "strong evidence to shew that they had come together, so as "to put an end to the deed; but it is going too far to say, "as the defendant's counsel was driven to say, that one act "of intercourse, no matter what the surrounding circumstances "were, would necessarily put an end to the deed. No case "has gone that length. They have gone to the length of "saying that if there is reconciliation the covenant to pay "money to the wife comes to an end. In this case has there "been reconciliation? It is plain on the uncontradicted "evidence of the wife that there has been no reconciliation in "the full sense of that term, and that neither party intended "that there should be."

I can adopt every word of that last passage as applicable to the present case with the substitution in the last sentence of the phrase "and that one of the parties never intended "that there should be" for the phrase "neither party intended "that there should be," and, having regard to the fact that Lord Russell had said that the resumption of cohabitation bringing the deed to an end is something which depends on the intention of both parties, I think that I am justified in holding here that there has neither been condonation nor a

(1) [1900] 1 Q. B. 9.
(2) Ibid. 13.
(3) Ibid. 14.

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resumption of cohabitation which interrupts the necessary period of desertion, and that, therefore, the wife is entitled to a decree nisi, with costs.

Solicitors: *Kenneth Brown, Baker, Baker.*

W. L.

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Feb. 10, 11, 12, 13, 16, 17; *Mar.* 27.

THE PASS OF BALLATER.

Shipping—Damage during repairs—Use of dangerous materials by repairers—Negligence of sub-contractor—Liability of repairers.

The plaintiffs' oil tanker was being repaired by the defendants, a firm of ship repairers, on their floating pontoon. To ascertain whether the vessel was "gas free" the defendants employed a consulting engineer who certified that the poop space was free for the use of naked lights, but made no mention of the after cofferdam which, in fact, he had not properly inspected. Relying on the certificate and wrongly assuming that the cofferdam was included by the engineer in the poop space the defendants used an oxy-acetylene burner in the poop space, and sparks descending a manhole leading to the cofferdam ignited a mixture of air and petrol vapour, in consequence of which there was loss of life and damage was done to the vessel. In an action to recover damages:—

Held, that while in general a person who employs a contractor is not liable for the acts of the contractor, yet where instruments or materials which are in themselves dangerous are being used, the principal has not merely a duty to take care but also a duty to provide that care is taken; that in failing to test the after cofferdam to ensure that it was gas free, even if this failure was due to the negligence of the consulting engineer and not to the personal negligence of the defendants or their servants, the defendants were failing in a duty the responsibility for which they could not delegate to a contractor, and that they were liable to the plaintiffs for the damage.

Interpretation to be put on the phrase "absolute obligation" in *Honeywill & Stein, Ld.* v. *Larkin Bros., Ld.* [1934] 1 K. B. 191, 200.

Held, further, that the defendants had been personally guilty of negligence in not reading and construing in its proper sense the certificate of the consulting engineer.

ACTION of damage by explosion and fire.

The plaintiffs, the owners of the oil tanker *Pass of Ballater*, claimed against the defendants, Cardiff Channel Dry Dock and Pontoon Co., Ld., in respect of damage received by the vessel through an explosion and fire on board on June 21, 1941, while she was undergoing repairs on the defendants' pontoon.

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At the material time an aperture was being cut by the defendants by means of an oxy-acetylene apparatus in the port side of a bulk-head situated in the poop space. A few feet from where the cutting was taking place a manhole led down to the after cofferdam. The cover of the manhole was off, and, according to the plaintiffs, sparks from the oxy-acetylene burner met in the cofferdam a mixture of petrol vapour and air and caused an explosion by which the vessel was damaged, two men lost their lives and several were injured. The plaintiffs' case was that the defendants did not take reasonable or proper steps in accordance with their contract and duty to see that the ship was gas free. The defendants alleged that they arranged for a consulting engineer, who was a competent and experienced analyst, to make tests in the ship for the presence of oil, inflammable gas, or vapour, and to issue certificates. The analyst was well known to the plaintiffs, and was accepted by them as their agent and as competent, and he granted certificates to the effect that the poop space, which the defendants contended included the after cofferdam, was free for the use of naked lights. Relying on these certificates the defendants used an oxy-acetylene apparatus in the poop space. They denied, however, that the explosion was caused as the plaintiffs suggested, and set up a theory that there must have been an explosion in the starboard fuel bunker.

Sir Robert Aske K.C. and *Owen Bateson* for the plaintiffs. The burden is on the defendants to show that they were not guilty of negligence. They were bailees and in control of the ship. The principles were clearly stated by Atkin L.J. in *The Ruapehu* (1). The defendants were carrying out a dangerous piece of work. They had an absolute duty cast on them by the Shipbuilding Regulations, 1931, and one, therefore, which they could not delegate: see *Smith* v. *Cammell, Laird & Co., Ld.* (2); *Ellerman Lines, Ld.* v. *H. G. Grayson, Ld.* (3). It is no defence that a competent workman has been employed: see *Honeywill & Stein, Ld.* v. *Larkin Bros., Ld.* (4). In fact, however, the analyst was negligent, and "those who engage in an undertaking the actual conduct "of which involves expert scientific or professional skill and

(1) (1925) 21 Ll. L. Rep. 310, 314.
(2) [1940] A. C. 242.
(3) [1919] 2 K. B. 514; [1920] A. C. 466.
(4) [1934] 1 K. B. 191.

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"knowledge which the principals do not possess, cannot escape "liability to outsiders who are injured by the negligence of "those who advise or act for the principals": per Lord Wright M.R. in *Lindsey County Council* v. *Marshall* (1).

Noad K.C. and *Brightman* for the defendants. The onus is on the plaintiffs to prove negligence and they have not discharged that onus. [LANGTON J. referred to *The Kite* (2) and the observations of Lord Dunedin in *Ballard* v. *North British Ry. Co.* (3) there referred to.] The defendants are not in the position of bailees, for the ship still had her crew, or many of them, on board. In any event, the analyst was the plaintiffs' agent and he grossly misled the defendants. There was, however, no obligation to get a certificate for the poop space because it is not an oil tank, and he included the cofferdam in the poop space. It is admitted that breach of a statutory order may be negligence, but cases like *Smith* v. *Cammell, Laird & Co., Ld.* (4) are a long way from the present case where the alleged negligence is that of the plaintiffs' own agent.

Aske K.C. replied.

Cur. adv. vult.

1942. Mar. 27. LANGTON J. read a judgment in which he stated—(*a*) that he could not regard the consulting engineer's work as either thorough, exhaustive or competent; (*b*) that he did not believe that by the words "poop space" the engineer ever intended to include the after cofferdam, nor that he ever made a full inspection of that compartment; (*c*) that the engineer was a sub-contractor for the defendants; (*d*) that the defendants were in occupation of the ship at the material time and alone had the knowledge and authority necessary to make adequate provision for safety and must shoulder the consequent liability if due precautions were neglected; and (*e*) that the explosion was caused, as the plaintiffs claimed, by the ignition through a spark from the oxy-acetylene burner of a mixture of volatile gas and air in the after cofferdam which was not completely gas free as it could and ought to have been; and continued: It remains to consider what are the legal consequences of this finding. Sir Robert Aske at the outset of the case put his contention on the ground of *Smith* v. *Cammell, Laird & Co., Ld.* (1).

(1) [1937] A. C. 97, 122.
(2) [1933] P. 154.
(3) 1923 S. C. (H. L.) 43, 54.
(4) [1940] A. C. 242.

Assuming, he said, that the defendants in the present action were occupiers of their own yard and pontoon, they could not escape the duty cast on them by the Shipbuilding Regulations, 1931, made under s. 79 of the Factory and Workshop Act, 1901. He traced this duty through the various regulations and claimed that it was an absolute one, arguing that, since the defendants had an absolute duty under these regulations to the plaintiffs, they could not excuse themselves by delegating it to a sub-contractor. While, of course, accepting in full all the implications of this very authoritative pronouncement from the House of Lords, I have considerable doubt whether the present case is really parallel to the facts on which that decision was based. As I understand it, the whole scope and object of the Factory Act is to impose on employers what are regarded by the legislature as reasonable and proper precautions for the safety of their employees. Similarly the Shipbuilding Regulations, 1931, are conceived in this same spirit of legislative protection. I doubt very much whether either the Act or the regulations were ever intended to impose extra duties, outside of those due under the common law, on parties bound by a contract of bailment and bearing no relation to one another under a contract of personal employment. In his final address Sir Robert put this point very much in the background. Indeed, I gathered that he had begun to share the doubts which had assailed me at the outset. In the end, therefore, he put his case squarely on the authority of the Court of Appeal in *Honeywill & Stein, Ld.* v. *Larkin Bros., Ld.* (1). By that decision the Court of Appeal went, I think, a little further than they had done in the previous cases in putting on a person who assumes the obligation of doing dangerous work a duty which they describe as absolute to guard against damage from such an operation. The judgment of the court, which consisted of Lord Hewart C.J., Lord Wright and Slesser L.J., was read by Slesser L.J. To select as near as may be the ratio decidendi, the judgment uses the following language (2): "The appellants, in procuring this work to be performed "by their contractors, the respondents, assumed an obligation "to the cinema company which was, as we think, absolute, "but which was at least an obligation to use reasonable "precautions to see that no damage resulted to the cinema "company from these dangerous operations: that obligation

(1) [1934] 1 K. B. 191. (2) Ibid. 200.

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"they could not delegate by employing the respondents as "independent contractors, but they were liable in this regard "for the respondents' acts." I confess that the language here employed has puzzled me a little. The use of the word "absolute," which is introduced apparently to denote a different and higher degree of obligation than the obligation "at least . . . . to use reasonable precautions" seems to suggest that the court has in mind a lower degree which is sufficient for the case in hand, and a higher kind of obligation which the court also thinks might be applied in this and other unspecified cases. But if this were really the meaning, if there could ever be a higher obligation than to use reasonable precautions, if, that is to say, the word " absolute " is to be taken to mean that the contractor assumes an obligation which admits of no answer or excuse, it could only signify that the contractor actually warranted the work. It would mean, for example, that he would be obliged to make good damage which was in no sense the result of any lack of reasonable precaution, but the result of pure chance, such, say, as the sudden and unexpected death of a workman in charge of the operation at the critical moment of its performance. I cannot believe that it was ever intended to suggest such a degree of obligation as arising at common law, though it is of course no stranger to statute law: see *Smith* v. *Cammell, Laird & Co., Ld.* (1). It would seem to me far more probable that the word " absolute " is employed here rather in the sense of " strict," and conveys only that the duty to use reasonable precautions when dealing with substances or materials which are dangerous in themselves, is one which the contractor cannot escape through employing a sub-contractor. I am aware that this interpretation does some apparent violence to the grammatical structure of the sentence in which the word " absolute " occurs, but it is entirely in line with the general trend of the whole judgment of which this sentence is the climax, and, as it seems to me, with the doctrine to be collected from the cases cited therein.

If one adopts this meaning of the word it would appear that the law stands in this way. In normal cases, which do not necessitate or involve the use of materials or instruments which are in themselves dangerous, a man is liable for the acts of his servants, but not for the acts of a contractor. *Quarman* v. *Burnett* (2). This general rule is subject to well

(1) [1940] A. C. 242.

(2) (1840) 6 M. & W. 499.

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established qualifications. For example, where a special duty is laid by statute on an individual or class of individuals, either to take care or even to ensure safety (an absolute duty: in the true sense), that person or class cannot delegate the duty so imposed on them, that is to say, they cannot by delegation diminish the duty or in any way escape from or evade the full implication of and responsibility for that duty: *Smith* v. *Cammell, Laird & Co., Ld.* (1). Again, where the introduction of implements or substances dangerous in themselves, such as flame-bearing instruments or explosives, are necessarily incidental to the work to be performed, a contractor is equally bound by an unescapable duty. The point may perhaps be crystallized by saying that he has not merely a duty to take care but a duty to provide that care is taken. It is, therefore, a matter of no importance in these classes of case whether he delegates the duty to a servant or to a sub-contractor. The burden of the duty cannot be thrown off, and if care has not been taken, wherever the fault may lie, and however he may have protected himself by special covenant with the individual or contractor actually in fault, he is liable in law to a party who has suffered by the default. Although the greater number of the cases concern instances of injured passers-by or third parties unrelated by any contractual obligation, the duty could hardly be less in a case such as the present where the contractor is already under a duty as a bailee to take care of the plaintiffs' chattel. The shortest and clearest statement of the law on this topic of which I am aware is to be found in the words of Lord Blackburn in *Dalton* v. *Angus* (2): "Ever since *Quarman* v. *Burnett* (3), "it has been considered settled law that one employing "another is not liable for his collateral negligence unless the "relation of master and servant existed between them. So "that a person employing a contractor to do work is not "liable for the negligence of that contractor or his servants. "On the other hand, a person causing something to be done, "the doing of which casts on him a duty, cannot escape from "the responsibility attaching on him of seeing that duty "performed by delegating it to a contractor. He may bargain "with the contractor that he shall perform the duty and "stipulate for an indemnity from him if it is not performed, "but he cannot thereby relieve himself from liability to those

(1) [1940] A. C. 242.
(2) (1881) 6 App. Cas. 740, 829.
(3) 6 M. & W. 499.

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"injured by the failure to perform it." The precautions to be considered reasonable in the circumstances vary naturally with the ratio of the danger, that is to say, precautions which might be considered reasonable where the danger was small might be plainly insufficient where the danger was increased. Thus in the present case, as in *Honeywill's* case (1), where the act which had to be performed necessitated the bringing of fire on to the premises, the standard of reasonable precautions is of necessity exceedingly high. I would go so far as to say that in a case of the present class no precaution which was commercially practicable ought to have been omitted, and any omission of a practicable precaution would constitute a failure of duty. No one could contend that a failure to test the after cofferdam in the present instance to ensure that it was gas free was not a failure to take a commercially practicable precaution. It was, indeed, a precaution which the defendants purported to take. Judged therefore, even by the standard which they set themselves the defendants were failing in a duty which they could not delegate to an independent contractor.

I have only one more word to add. Apart altogether from the question of independent contractor, and what may or may not be delegated to him, I should in the present instance have felt it my duty to come to the conclusion that the defendants were themselves negligent or failing in their special duty arising from the fact that they were dealing with dangerous work in not reading and construing in its plain and proper sense the certificate which they had obtained from the consulting engineer. I am glad that it has not been necessary to base my judgment on this ground principally or alone, because I own to a considerable sympathy with a man in the position of the defendants' manager, who, having explained to his chemical expert the exact nature of the repair work which he had in contemplation, does not scan narrowly the certificate which the expert presents to him. But if the matter is considered on this basis, however much one may sympathize with a busy and harassed manager, I cannot see how it would be possible to excuse him from failing to notice that one of the compartments which he was about to expose to the sparks of an oxy-acetylene burner had not been certified as "gas-free." It may well seem to commercial men that the standard of care thus set is high, but as I under-

(1) [1934] 1 K. B. 191.

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stand the law it is intended that the standard of care, where dangerous substances are concerned, should be maintained at the highest possible level. There will be judgment for the plaintiffs, with costs.

Solicitors for plaintiffs: *Ingledew, Brown, Bennison & Garrett.*

Solicitors for defendants: *Wm. A. Crump & Son, for Gilbert Robertson & Co., Cardiff.*

E. C. M. T.

THE JERSEY.

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Feb. 11, 12; *Apr.* 23, 24, 29.

Shipping—Damage—Striking submerged and unbuoyed wreck—Duties of port authority—Delegation of duties to naval authorities.

On January 8, 1941, the plaintiffs' ship was damaged by striking a submerged and unbuoyed wreck in the River Thames. The place where the wreck was lying was within the limits of the Port of London Authority's jurisdiction, but they had no right or interest in the bed of the river in that area. In normal circumstances the Authority would have marked the wreck and given notice of its presence, but it was impracticable to do so in time of war as the movements of their ships were restricted and the position of wrecks was not reported to them. They had accordingly handed over the duty of wreck marking in that part of the river where the wreck lay to Naval Control, a department of the Admiralty. Naval Control had placed a dan-buoy near the wreck on December 28, 1940, but nobody saw the buoy after January 3, 1941. In an action by the plaintiffs against the Port of London Authority:—

Held, that although the defendants had no right or interest in the bed of the river in the area in question they had an obligation to see that the river was reasonably safe for navigation; but that in handing over the duties of marking wrecks to Naval Control they acted reasonably and performed the duties cast upon them in delegating those duties to competent persons; and that accordingly the action failed.

Haseldine v. *C. A. Daw & Son* [1941] 2 K. B. 343 followed; *Francis* v. *Cockrell* (1870) L. R. 5 Q. B. 501 distinguished.

ACTION of damage.

The plaintiffs were the owners of the motor-ship *Jersey*; the defendants were the Port of London Authority. The action was in respect of damage received by the *Jersey* in waters within the limits of the Port of London as defined by s. 1 of the

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Port of London (Consolidation) Act, 1920 (10 & 11 Geo. 5, c. CLXXIII.). About 1.25 P.M. on January 8, 1941, the *Jersey* was coming to anchor off Southend when she struck a submerged wreck and sustained damage. The wreck was the remains of the *Kinnaird Head*, which had sunk on December 27, 1940. The wreck was submerged and unmarked, a dan-buoy which had been placed to mark the wreck on December 28 being no longer in position, and those in charge of the *Jersey* had no warning or notice of its existence. The plaintiffs alleged that the damage was due to a breach by the defendants of their duty to use reasonable care to see that the waters within their jurisdiction were reasonably safe for the *Jersey* to navigate, or, alternatively, to warn the plaintiffs of any dangers to the *Jersey* while navigating the said waters, or to warn them that such care had not been taken. The defendants admitted that they were the constituted authority over the Port of London but did not admit that they were under any duty to the plaintiffs, and alleged that their jurisdiction over the area in question and their duties in respect thereof had been taken over by H.M. Naval Authorities.

Sellers K.C. and *Porges* for the defendants. No breach of a statutory duty is alleged, and to render a port authority liable at common law they must be in control of the place where the accident happened. The defendants were not in occupation of the bed of the river in the area in question (s. 199 of the Port of London (Consolidation) Act, 1920) and had no control over the waters where the wreck was lying. The whole duty of port authorities laid down in *Mersey Docks and Harbour Trustees* v. *Gibbs* (1) is based upon control: see also *St. Just Steamship Co.* v. *Hartlepool Port and Harbour Commissioners* (2). The doctrine of invitor and invitee does not affect the defendants' liability unless they have held themselves out as undertaking the duty of buoying wrecks or giving warning: see *The Utopia* (3). The defendants did not "invite" vessels to navigate over that particular part of the river, and the wreck had not been handed over to them.

Assuming, however, that the defendants owed a duty as regards the buoying of the wreck they fulfilled that duty by the arrangement entered into with Naval Control whereby Naval Control took over the duty of marking wrecks in that

(1) (1864) L. R. 1 H. L. 93.
(2) (1929) 34 Ll. L. Rep. 344.
(3) [1893] A. C. 492.

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part of the river. They had knowledge of the position of wrecks and had facilities for dealing with them which the defendants had not, and even if Naval Control were negligent the defendants are not liable: *Haseldine* v. *C. A. Daw & Son* (1).

Reference was also made to *The Neptun* (2), *Queens of the River Steamship Co.* v. *Commissioners of River Thames* (3), *Bede Steamship Co.* v. *River Wear Conservators* (4) and *The Orita* (5).

G. St. C. Pilcher K.C. and *Owen Bateson* for the plaintiffs. The defendants owed certain duties at common law to see that the river within the limits of their jurisdiction, which included the area in question, was reasonably safe for vessels to navigate in: see the observations of Wright J. in *St. Just Steamship Co.* v. *Hartlepool Port and Harbour Commissioners* (6). It cannot be said that they have no control and no obligation over parts of the river within their own port. There is no statutory rule or order which absolves them from any part of their undertaking. They could not get rid of their liabilities by delegating them to Naval Control: *Francis* v. *Cockrell* (7).

[BUCKNILL J. That case is based on contract.]

There is an implied contract in this case. In *Haseldine* v. *C. A. Daw & Son* (1) the plaintiff was a mere licensee; in the present case the plaintiffs were invitees; also it is submitted the Naval Control were the defendants' agents and not independent contractors. Further, the defendants did not purport to hand over the general maintenance of the river or the obligation to mark wrecks in all circumstances to Naval Control. The defendants could have put dan-buoys themselves or at least have issued a warning to the plaintiffs.

Cur. adv. vult.

April 29. BUCKNILL J. Mr. Sellers argued on behalf of the defendants that the defendants did not owe a duty to the plaintiffs to use reasonable care as alleged in the statement of claim. His argument was that the Port of London Authority had no right or interest in the bed or shore of the Thames at the place in question, and therefore that the principle laid

(1) [1941] 2 K. B. 343.
(2) [1938] P. 31.
(3) (1906) 22 T. L. R. 419, 421.
(4) [1907] 1 K. B. 310.
(5) (1924) 19 Ll. L. Rep. 263.
(6) 34 Ll. L. Rep. 344.
(7) (1870) L. R. 5 Q. B. 501.

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down by the House of Lords in *Mersey Docks and Harbour Trustees* v. *Gibbs* (1) did not apply to them.

[His Lordship referred to the relevant sections of the Port of London (Consolidation) Act, 1920, and said that while under s. 199 the Port Authority had not "any right or interest in "or to the bed or shore of the Thames eastward of an imaginary "line drawn from Yantlet Creek to the City Stone opposite "to Canvey Island," which was a line drawn above the position of the wreck of the *Kinnaird Head*, under s. 197 and sch. I the seaward limits as there defined were below the place where the wreck was lying, and under s. 431 "Whenever any vessel "is sunk or stranded in any part of the Port of London, the "Port Authority shall cause such vessel to be raised or to be "blown up or otherwise destroyed," and continued:] It is clear from the evidence of Capt. Coleman, the defendants' harbour master, that under normal circumstances the defendants would have marked the wreck of the *Kinnaird Head* and have given notice of its presence to those navigating ships within its area. I think that the position and duties of the defendants over the part of the river in which the *Kinnaird Head* lay are in principle the same as those of the Commissioners as laid down by Wright J., as he then was, in *St. Just Steamship Co.* v. *Hartlepool Port and Harbour Commissioners* (2). There is a passage in the judgment which I think is helpful in this case. Wright J. said: "In those circumstances the law is "now well established. The liability of the Commissioners in "such a case does not directly depend upon the terms of the "private Act. It depends on the special relations arising "de novo as each ship enters the jurisdiction of the port, "and it is a duty, which had been very clearly expressed in a " number of cases, which is said to be analogous to the ordinary "common law duty existing as between invitor and invitee." He refers to *Mersey Docks and Harbour Trustees* v. *Gibbs* (1), and says: "It is perfectly true that the obligation of the "Commissioners is not abstract; it is not in the nature of a "warranty, as has often been said. It is an obligation to use "reasonable care to carry out that duty to see that the Port is "reasonably safe for those coming there and navigating it "on their lawful occasions and for reward to the Com-"missioners." I, therefore, decide this point in favour of the plaintiffs.

(1) L. R. 1 H. L. 93. (2) 34 Ll. L. Rep. 344, 348, 349.

The next point taken by Mr. Sellers was that if the defendants did owe such a duty as the plaintiffs allege the defendants had not in fact committed a breach of it. The Elder Brethren have advised me that the *Jersey*, when coming to anchor on the ebb tide in the authorized anchorage, might, in the ordinary course of navigation, swing to the eastward of the eastern limit to such an extent as to foul the wreck of the *Kinnaird Head*. In my view, therefore, in normal circumstances it would have been the duty of the defendants to warn the pilot and master of the *Jersey*, either by general notice, or otherwise, of the existence of this hidden wreck and to place a proper wreck-marking buoy near it. The question, therefore, is whether, under the peculiar circumstances which existed at the time, the defendants were absolved from liability for failure to give this warning and to place such a buoy near the wreck.

The plea in the defence on this part of the case is this. The defendants say that their jurisdiction over the said area and their duties in respect thereof at the material time and for all material purposes had been taken over by His Majesty's Naval Authorities. Mr. Sellers, in his argument, did not suggest that the defendants had been legally superseded by Naval Control or had been released by any statute or order of their liability to make good to the owners of ships using the port any damage occasioned by their neglect to buoy wrecks or warn owners of ships of hidden dangers within the waters under their jurisdiction. His argument was that the defendants had in fact taken reasonable care to perform their duty so far as the wreck of the *Kinnaird Head* was concerned by handing over the duty of buoying and of giving warning to Naval Control. He argued that after they had so handed over these obligations they were not legally responsible for any failure by Naval Control to warn pilots or masters of vessels of the existence of the wreck or of any failure to maintain in position a buoy marking the wreck.

The material facts on this point are as follows. When the war started, various statutory rules and orders were made which had the effect of limiting the ambit of the work which the defendants could do in the matter of finding and marking wrecks in the eastern part of the waters of the Port of London. There are the well known orders under which all British merchant vessels at all times when in British territorial waters "shall comply with any sailing or routeing instructions which

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"may from time to time be issued to them by the Admiralty "or by any person authorised by the Admiralty to act under "this Order." That is Navigation Order No. 1, dated August 26, 1939. Navigation Order No. 4, dated December 6, 1939, lays it down that "A person authorised under this Order "may give directions to prohibit or restrict the entrance or "departure of ships or of any ship to or from any port in his "command or to restrict the movements of ships or of any "ship within the area of or the approaches to such a port." Vessels of the defendants come under those restrictions. In pursuance of these powers conferred on the Admiralty, Naval Control, a department of the Admiralty, instructed ships of the defendants as to the routes which they should take and no ship of the defendants could lawfully move within the port without being so routed.

In December, 1940, certain ships were sunk in the estuary of the Thames. The number and positions of those wrecks were not known to the defendants and they were not reported under s. 52 (*a*) of the Port of London River Bye-laws, which is in these terms: "The master of every vessel which through "accident or other cause has sunk in the river shall forthwith "give to the harbour master notice thereof and of the position "of such vessel and such particulars as may be required for "the safety of navigation." Commander Coleman having heard rumours that ships had been sunk in these waters, instructed Captain Morrison, the assistant harbour master, to go down the river and find out what had happened. Captain Morrison did so on December 19, and, after obtaining permission of the naval officer in charge at Southend Pier, inspected the wrecks so far as he was able. He then made a report, in which he said: "The question arises as to how these wrecks "should be marked. At present the only marking is by means "of dan-buoys, placed by the local naval authority, which "buoys may or may not be considered sufficiently reliable "and satisfactory for the purpose they are intended to serve. "Responsibility for marking, of course, rests with the port "authority, and I therefore submit the problem to you for "such consideration and attention as it may demand. My "summing-up is that if wrecks are likely to lie in the river for "any length of time before being salved they should be marked "by proper wreck buoys. Suitable buoys for wreck-marking "purposes might be obtainable from Trinity House on hire."

Commander Coleman said that after getting this report he

becamed alarmed at the position and saw Lord Teynham, the senior officer in charge of Naval Control, and suggested to him that Naval Control should mark wrecks downstream of No. 4 Sea Reach buoy, as it was impossible for the defendants to do so. Lord Teynham agreed to this proposal. The substance of the agreement thus come to was set out in a memorandum of that date from Commander Coleman to the general manager of the defendants. That memorandum gave reasons why it was impracticable for the Port Authority's craft to mark the wrecks and stated that: "It has been "arranged that the Naval Control service shall, as far as is "practicable, mark the wrecks by dan-buoys. Masters of "vessels will be warned by Naval Control service of these "wrecks and their markings." Commander Coleman explained to the court that it was impossible for the defendants to sweep for wrecks for reasons which he gave, and in any case they could not do so without the permission of Naval Control. Neither was it possible for the defendants to mark all the wrecks with international wreck-marking buoys after the Admiralty mine sweepers had found them and their positions had been notified to the defendants by Naval Control. Even if the defendants had had sufficient wreck-marking buoys, which they had not, they could not decide which side of the wreck was to be passed by shipping navigating in the waters adjacent to the wreck. It is true that they could have put up dan-buoys after they had been informed of the position of the wreck and had been given permission to do so by Naval Control. In my view the arrangement made by the defendants was reasonable at that time. It would tend to produce the most prompt and satisfactory marking of wrecks and warning of their presence, provided Naval Control carried out their part of it, which they were in a favourable position to do.

On December 22, Naval Control marked the wrecks with dan-buoys so far as that was practicable. I accept the evidence of the witness who put a dan-buoy down near the wreck of the *Kinnaird Head* on December 27. He did this on the instructions of an officer of Naval Control. He saw this buoy on January 2 or January 3, but it had disappeared by January 8, and there is no evidence that it was in position after January 3—and, having regard to the weather and the number of vessels moving in and out of the anchorage, there is little, if any, presumption that it would continue in position.

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The Elder Brethren consider a dan-buoy to be an unreliable form of marking a wreck.

On January 7 the officials of the defendants had a meeting with representatives of Naval Control to discuss the question of marking wrecks and the following conclusions were embodied in a memorandum of which the following extract has been placed before the Court: "Marking of wrecks . . . . (1.) Above "No. 4 Sea Reach Buoy the marking of wrecks is to remain "a matter for the Authority to carry out as they think fit. "(2.) Below No. 4 Sea Reach Buoy the Authority will take no "steps to mark wrecks unless requested to do so by the Naval "Control Service . . . . It was further agreed that two of the "wrecks in the estuary should be marked forthwith, namely, "the *Molrix* with a port-hand buoy and the *Kinnaird Head* "with a starboard-hand buoy."

In my judgment this also was a reasonable arrangement for the defendants to make.

I have next to consider whether the defendants, having made these arrangements with Naval Control, committed any breach of duty towards the plaintiffs in that they failed to warn the pilot or master of the *Jersey* of the presence of the wreck of the *Kinnaird Head* and failed to see that on January 8 the wreck was marked by a buoy. In my view their failure to do either of those things does not indicate any breach of their duty towards the plaintiffs. The defendants were justified in assuming that Naval Control would properly perform the task which they had undertaken of buoying and of warning in case of wrecks below No. 4 Sea Reach buoy, and the defendants knew that Naval Control were in a better position for doing this promptly than they, the defendants, were. I do not think that it would be reasonable or expedient that both Naval Control and the defendants should try to perform the task of the buoying of sunken wrecks and giving warning of them to pilots and masters.

The only remaining point was whether the defendants could in law be said to have performed their duties towards the plaintiffs by making the arrangements which they in fact made. Mr. Pilcher relied on *Francis* v. *Cockrell* (1) which he said applied to this case, and in effect prevented the defendants from evading their liability to the plaintiffs. I need not refer to the case in detail. It is sufficient to say that the defendant engaged with a contractor to put up a stand; the

(1) L. R. 5 Q. B. 501.

contractor put up the stand negligently—it was improperly constructed—and in consequence it fell upon and injured the plaintiff. The defendant sought to escape liability on the ground that he had made a contract with a competent contractor, but he was held to be liable, and it is quite clear that he was held liable because, having made the contract with the plaintiff which contained an implied term that the stand would be reasonably fit for the purpose for which it was to be used, he could not escape from that contractual obligation by pleading that he had engaged somebody else who, he had reason to think, was capable of putting up the stand properly. I do not think that that case applies to the point I am considering now. It is not suggested in this case that the defendants entered into any contract with the plaintiffs. Their liability was that of an invitor to an invitee.

The case which seems to be in point is *Haseldine* v. *C. A. Daw & Son* (1). In that case one of the defendants was the landlord of a block of flats and had made a contract with a competent firm of engineers to do certain work to the lift of the flats. The engineers did their work negligently and as a result a visitor to the flats, when using the lift, was injured. The defence made by the landlord to the plaintiff was that he, the landlord, had employed a competent firm of engineers to keep the lift in order and that therefore, under the circumstances, he was not liable for the plaintiff's injuries. The Court of Appeal held that he was not liable. Goddard L.J. said: "It is argued that, if the engineers were negligent, it "cannot be said that the occupier has discharged his duty. "With this I cannot agree. An occupier or any other person "may have, either by contract or by law, such a degree of "duty imposed on him that he cannot discharge it by em- "ploying a contractor to do work for him, but where the duty "is to take care that the premises are safe, I cannot see how it "can be discharged better than by the employment of com- "petent contractors." Then the Lord Justice continues: "Where, however, the duty is not contractual but that which "the law attaches to an invitor, I am satisfied that in such "a case as the present he can discharge it by employing a "competent expert."

It cannot be disputed that Naval Control were competent persons to whom the defendants might delegate their duties.

I think this was a proper arrangement for the defendants

(1) [1941] 2 K. B. 343, 374.

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to make with Naval Control and that, under all the circumstances, they did not fail to take reasonable care to mark the wreck of the *Kinnaird Head* or to warn the plaintiffs of its existence. That being so, the plaintiffs have not succeeded in making out a case against the defendants and there must be judgment for the defendants.

Solicitors for plaintiffs: *Middleton, Lewis & Clarke.*
Solicitor for defendants: *G. J. D. Tull.*

E. C. M. T.

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Feb. 25, 26, 27.

THE SCOTTISH MUSICIAN.

Shipping—Collision—Single ship meeting ship in convoy—Admiralty Notices to Mariners (1941), *No.* 7, *direction* 4.

By direction 4 of No. 7 of the Admiralty Notices to Mariners (1941): "In circumstances where a single vessel has not taken "early measures to keep out of the way of a squadron . . . . "the 'Regulations for Preventing Collisions at Sea' must be the "guide."

The *G.* and the *S.M.* came into collision. The *G.* was a single ship; the *S.M.*, unknown to those on the *G.*, was one of a convoy. The vessels were sailing without lights. Those on the *G.* sighted the loom of the *S.M.* on the port bow distant about a quarter of a mile and at once switched on their side lights. The red light of the *G.* was not picked up by those on the *S.M.* until at least half a minute later when it was distant about 900 feet and bearing two or three points on the starboard bow. The *S.M.* at once switched on her lights, stopped her engines, starboarded her wheel, and immediately afterwards went full speed astern; and as soon as those on the *G.* saw the green light of the *S.M.* they starboarded their wheel, but the collision occurred almost immediately. By art. 19 of the Regulations for Preventing Collisions at Sea: "when two steam vessels are crossing, so as "to involve risk of collision, the vessel which has the other on her "own starboard side shall keep out of the way of the other."

In an action by the owners of the *G.* against the owners of the *S.M.*:—

Held, that the *S.M.* had no duty to comply with art. 19 of the Regulations, but that in accordance with the Regulations so far as they deal with matters of good seamanship, as for example, the duty to keep a good lookout (art. 29), she had to take every measure she could to avoid collision with a vessel not in the convoy consistent with not creating more imminent danger still to other vessels in the convoy; that the *S.M.* ought to have picked up the light of the *G.* a little sooner than she did and

accordingly have taken action sooner than she did, and that she was alone to blame.

Direction 4 of Admiralty Notices to Mariners (1941), No. 7, considered, and difficulties of interpreting its meaning commented on.

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ACTION of damage (1).

The plaintiffs were the owners of the steamship *Glenbride*; the defendants were the owners of the motor-ship *Scottish Musician*.

According to the statement of claim, on the night of April 15, 1941, the *Glenbride*, while bound from Barry to Dublin and making about nine knots sighted the loom of the *Scottish Musician* distant about a quarter of a mile and bearing about four to five points on the port bow. The side lights of the *Glenbride* were at once switched on and shortly afterwards the green light of the *Scottish Musician* came into view. The wheel of the *Glenbride* was put to starboard, but the *Scottish Musician* came on, altering to starboard, and her stern struck the port side of the *Glenbride*.

According to the defence, the *Scottish Musician* was the fourth vessel in the starboard column of a convoy proceeding in two columns and making about three knots, when the red light of the *Glenbride* came into view distant about two ships' lengths and bearing about two to three points on the starboard bow. The engines were at once stopped, the wheel put hard-a-starboard and the lights switched on. Almost immediately afterwards the engines were put full speed astern as it was seen that the vessel would not clear.

Hayward K.C. and *Owen Bateson* for the plaintiffs.

G. St. C. Pilcher K.C. and *Porges* for the defendants.

[The arguments were mainly directed to the facts and the question of the construction of the Admiralty Notice to Mariners is fully dealt with in the judgment.]

LANGTON J. The case of the *Scottish Musician* against the *Glenbride* was that the *Glenbride* was a vessel unencumbered and out of convoy, and that it was her duty, therefore, to keep out of the way of the convoy, and that she did not do so because of a negligent lookout. That is the whole extent of the case against the *Glenbride*. Nobody doubts that it is the

(1) The action was heard in camera. The judgment, with certain deletions, has been passed by the Admiralty and the case is reported with the approval of Langton J.—REPORTER.

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duty of an unencumbered vessel to keep out of the way of a convoy, if she can see the convoy. That has been a matter of instruction from the Admiralty, and it has also been laid down in law that it is the duty of an unencumbered vessel to keep out of the way of a convoy. But, of course, that duty only arises if and when the unencumbered vessel can see, or ought to see, the convoy which she is to avoid. Therefore, the whole of the *Scottish Musician's* case against the *Glenbride* rests upon the matter of lookout: Ought the *Glenbride* to have seen the convoy? It is probable that the *Glenbride* was a considerable distance from the leading vessels in the convoy when they turned towards her, and she picked up the *Scottish Musician* as a loom at a distance of a quarter of a mile. The Elder Brethren advise me, and I accept their advice, that there is nothing at all negligent—on the contrary, it is evidence of a good and vigilant lookout—in the fact that the *Glenbride* picked up the loom as far away as a quarter of a mile. And when one bears in mind that none of the other vessels in the convoy appear to have given her the assistance of putting on their lights it would be hard measure indeed to suggest that the *Glenbride* should be considered to be guilty of having a bad lookout because she had not seen the looms of some of the other vessels in the convoy. I unhesitatingly acquit her of the charge of having a bad lookout. She did not know that the convoy was there, and I do not think she could have known.

Now I come to deal with the much more difficult case of the *Scottish Musician*. That was confused, I thought, by a point which makes no appeal to me at all. Mr. Hayward said: "This is a case of art. 19. The crossing rule applies. The "*Glenbride* was showing a red light on the starboard bow of the "*Scottish Musician* and the *Scottish Musician* had a duty to get "out of the way." He reinforced that point by citing direction 4 of No. 7 of the Admiralty Notices to Mariners (1941). "Caution with regard to single ships approaching "squadrons or aircraft carriers." That direction reads as follows: "In circumstances where a single vessel has not "taken early measures to keep out of the way of a squadron ". . . . 'the Regulations for Preventing Collisions at Sea' "must be the guide."

I hesitate very much to offer any criticism, even in the most constructive spirit, of a Notice to Mariners issued by the Admiralty. It may be entirely clear to mariners what that

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direction means, and, if so, it would be a great pity to say anything to disturb it in any way. I can only say that for my part it is not only far from clear but is almost beyond any interpretation at all, and my assessors, who are seamen, have just the same difficulties as I have in understanding the limits and ambit of it. I will analyse it a little in detail and point out where my difficulties lie. I will start with the clear and well known principle that a single vessel has a duty to keep out of the way of a squadron, or convoy—always, of course, assuming that she knows, or ought to know, of its presence. If that be the case, what I may call the "special" or "directive" rules of the sea, that is to say, the crossing rules (arts. 19 and 21), the end-on rule (art. 18), and the overtaking rule (art. 24), are obviously, for the moment at any rate, in abeyance. Art. 19 then, to confine the matter to this case, could not apply, because the single vessel has always the duty to keep out of the way of a convoy. But the direction says that where the single vessel has not taken early measures to keep out of the way the Regulations for Preventing Collisions at Sea must be the guide. I have great difficulty in understanding, first of all, what are "early measures." Where do they end? Who is to be the judge of when "early "measures" have not been taken? Then I have a further difficulty as to what is the position if those problems are resolved. In the present case the single vessel did not take "early measures"; at least, I would imagine she did not take "early measures," because she did not know anything about the convoy until after the collision happened. In that second state of affairs, when the single vessel has not taken "early measures," the direction does not say that the Collision Regulations are to apply; it says that they are to be the guide. Again, I am in difficulty as to what that means. I know what is meant by "applying" the Collision Regulations, but I do not understand a situation in which the regulations do not apply but are the guide, because I cannot visualize exactly how they can be a guide if they do not apply.

I will state the matter as it appears to my assessors and myself. When a vessel is in convoy she is in what I may, for the purposes of brevity, call an enclosed position; her freedom of movement is hampered by the fact that she has a vessel ahead of her, a vessel astern of her and vessels on her port, or, as the case may be, her starboard side. I can well understand that in those circumstances the Collision Regulations, if one takes into

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account what I have called the "special" or "directive" regulations, do not apply, and arts. 19 and 21 cannot in strictness be applied to her at all. But I can well understand —and my assessors are at one with me in this—that it is not desirable that a vessel in that situation should regard herself as absolved from the duties of good seamanship; and in so far as those duties are laid down in the general regulations, namely, arts. 27 and 29, then it is only just and fitting that they should apply. A division of that kind leaves the matter in this guise: A vessel enclosed in convoy is not in any sense bound at any time by what I have called the "directive" parts of the regulations, but she has the same duty as has every other vessel on the sea to take every possible means, consistent with good seamanship, to avoid a collision. She is not to regard herself, because she is in convoy, as a vessel which is excused from keeping a lookout outside the convoy; she is not to regard herself as a vessel which, because she cannot obey art. 19, cannot take any means to avoid an imminent collision; on the contrary, she has to take every possible means of avoiding a collision which she can take without danger, that is to say, without creating more imminent danger still to her consorts in the convoy. She has a duty to the convoy to keep her station, but she must not press that duty to the point of never taking measures to keep out of the way of some other vessel which is threatening her with collision. She has a duty not to throw herself across the line of her own column. But again there may be circumstances in which it is better even to do that, with proper notice to the ship behind, than to run into a ship that is meeting the convoy from outside.

It is not possible to lay down any precise rules as to what she is to do, but if a division is to be made I would respectfully suggest for the consideration of the Admiralty that the division should be this, that whereas the regulations as such (meaning thereby the "directive" regulations) do not at any time apply to a vessel so enclosed, the regulations, in so far as they deal generally with matters of good seamanship, do apply. If that is all that direction No. 4 of Admiralty Orders No. 7 really means, then I would have no quarrel with it. At the present moment I can only say that it does not read in that sense to me, and I cannot myself understand what it means.

I come back to apply what I have said to this case. The *Scottish Musician* had no duty, as I and as the Elder Brethren

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see it, to comply with art. 19. She was not in a position in which she could carry it out either fully or properly, and, therefore, she was not in a position to be ruled by it at all. But what did apply to her were the duties of good seamanship. She ought to have been keeping a good and proper lookout, and she ought to have taken proper and seamanlike measures to avoid collision with the *Glenbride*.

The facts, as I find them, are that for a good half minute the *Scottish Musician* failed to pick up the red light on her starboard bow; she did not see it until it was some two lengths away from her.

Very reluctantly I have come to the conclusion, with the assistance and concurrence of the Elder Brethren, that this omission amounts to a failure of good seamanship on the part of the *Scottish Musician* and that such failure must be regarded as negligence in the circumstances.

Now, did that negligence contribute to the collision? Again, very reluctantly, I have come to the conclusion that it did. The *Glenbride* was hit forty feet from her stern when she was going at nine knots. If the red light had been picked up, as it ought to have been picked up, within a few seconds of its being exhibited, obviously the *Scottish Musician* could have stopped earlier than she did, and, turning under a starboard wheel, could have gone away further under that starboard wheel than she did.

That leaves the case in this position. The *Glenbride* had a good lookout and is not to be blamed in any way for the collision. The *Scottish Musician* had a defective lookout, which—much as we sympathize with the people on board having regard to their difficulties—caused this collision, and she must be held alone to blame.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendants: *Holman, Fenwick & Willan.*

E. C. M. T.

1942
May 13.

BULLOCK *v.* BULLOCK AND VARGOLICI.

Divorce—Prayer for exercise of discretion—Alimony pending suit—Respondent wife's claim—Her admission of adultery withdrawn—Jurisdiction.

Before a husband petitioned for divorce on the ground of his wife's alleged adultery the wife had written a letter which, taking the words used in their ordinary meaning, was a confession of adultery. In her claim for alimony pending suit the wife denied in an affidavit that she had committed adultery. The Registrar dismissed her claim for alimony on the ground that she had admitted adultery:—

Held, on appeal, that all the circumstances relevant to the issue must be taken into account, including the plea of the petitioner for the exercise of the discretion; the fact that some years ago a separation order had been granted to the wife though cohabitation was resumed; that for some time before the petition the parties had by mutual consent been living apart; and the wife's suggestion that the petitioner had given her a certain degree of licence to do as she pleased. Therefore the application for alimony pending suit must be considered by the Registrar.

SUMMONS adjourned into court in husband's divorce suit on the ground of alleged adultery.

On an application by the wife respondent for alimony pending suit the Registrar on April 22, 1942, disallowed the claim because on her own admission she had committed adultery. The husband in his petition asked for the exercise of the court's discretion. By their answers the respondent and the co-respondent denied the charges. The wife appealed to the judge from the Registrar's decision.

The marriage took place in 1929. The Christchurch (Bournemouth) magistrates granted the respondent a separation order, with 15*s.* a week maintenance, in April, 1935, but on May 29, 1935, the parties resumed cohabitation. Before the husband filed his petition in December, 1941, the parties had been living apart by mutual agreement. In a letter dated October 26, 1941, the wife addressed her husband in terms which must convey to any ordinary person that she meant to admit that she had committed adultery. Subsequently she swore an affidavit in the alimony proceedings denying adultery.

Ifor Lloyd for the petitioner.
P. R. Hollins for the respondent.

LANGTON J. The wife's letter of October 26, 1941, left very little doubt that she had committed adultery once, if not more often, with one person, and possibly with two or three persons. She expressed herself, however, with some ambiguity in different passages of the letter. It is a long, rambling effusion, obviously, I should say, not composed at one sitting, and is rather contradictory in different passages. However, one cannot escape from the fact that she comes as close to an admission of adultery as to say in terms, "I have "been unfaithful."

In her subsequent affidavit the respondent said: "In "spite of the letters I say that I have never committed adultery "either with the co-respondent named in this suit or with any "other person; I have instructed my solicitors to file a cross-"petition for the dissolution of my marriage on the ground of "the petitioner's adultery. This is being prepared and will "be filed in due course."

The Registrar took the view that the letter was so plainly in terms an admission of adultery that the affidavit must be false. I agree with him that some of the terms in the letter look pretty plain; but I think it is an extreme course to say, in view of the rambling character of this letter, that the affidavit must be false.

There are certain other circumstances in this case which I think should be taken into account. The respondent more than suggests in the letter that the parties have been living apart upon a kind of agreement that they could each do as they pleased. I think that is a circumstance which has to be borne in mind. It should be remembered that if the husband, for example, had been guilty of conduct conducing —I agree there is no such plea at present on the file—there would have been no bar to her claim for alimony pendente lite in the fact that the woman had admitted adultery. There is the other alternative that the letter is a mere romance, that it has no substratum of truth at all, and that the affidavit is to be preferred.

In *Welton* v. *Welton* (1) the President, Lord Merrivale, thought that there was a fit case in which to award the wife alimony pendente lite because of the whole of the circumstances of the case; and he was upheld in his decision by the Court of Appeal. The case is very clear authority for the proposition that the mere fact that the woman has admitted

(1) [1927] P. 162.

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adultery, important as it may be, is not always a bar to an application of this class.

I have to take into account all the circumstances of this case. I pay great attention to the fact that the lady has made an affidavit in which she says that the apparent admissions she makes in the letter, clear as they appear to be, are in fact without substance, and that she is coming to say that she has not committed adultery. There is a second point; what is the situation if the statements in the letter are to be taken at their face value? In that case she certainly has committed adultery; but she has been living apart from her husband with her husband's consent, and, as I read her letter, with a large degree of licence to do as she pleased.

On both of those grounds, therefore, I think that this is in no sense a clear case such as we have in the books of a woman having an admission of adultery or a finding of adultery against her without any qualification in the other circumstances of the case. Here one must take into account the fact, that with a separation order made against him, it hardly looks as if the husband comes to the court as a person completely without fault, and also take into account the fact that he is seeking the exercise of the discretion of the court. I shall therefore send this case back for the Registrar to consider the application for alimony pendente lite.

His Lordship ordered costs in the cause, and granted leave to appeal.

Solicitor for petitioner: *Wm. Daybell.*
Solicitors for respondent: *Borm-Reid & Co.*

W. L.

1942
May 20, 21.

IN THE GOODS OF HOPE BROWN, DECEASED.

Probate—Dependent relative revocation—Incomplete will revoking former will—Both documents admitted to probate.

By a will prepared by solicitors in 1934 a testator disposed of all his property. By a holograph will executed in 1939 he revoked previous testamentary dispositions and made provision for his wife, but otherwise the document was incomplete in material particulars:—

Held, that the doctrine of dependent relative revocation could be applied, although part of the later will was good, because

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the revocatory clause was inserted in it conditionally on it (the later will) being concluded, and, as it was not concluded, both documents would be admitted to probate without the inclusion of the revocatory clause in the later will.

MOTION for grant of probate.

By a will made with professional assistance dated January 21, 1934, the testator, Capt. Henry Hope Brown, appointed his wife and the Royal Exchange Assurance his executors and trustees, made certain bequests to his wife and provided for her occupation of a house during her lifetime, left pecuniary legacies to relations and friends, and, subject to his wife's life interest in the residue, devised it to certain relations. By a holograph will dated December 13, 1939, the testator appointed his wife executrix, but the nomination of a second executor was left blank. The will contained a clause revoking previous testamentary dispositions and gave a life interest in the estate to the testator's wife. Another clause directed pecuniary bequests to be paid free of duty, but the dispositions contained no pecuniary bequests. Clause 4 was as follows: "On the death of my said wife I direct my trustees to sell "the real estate, as also to call in sell and convert the movable "estate into money and to divide the proceeds thereof amongst "the after-mentioned beneficiaries herein and interests named "in following proportions, namely . . . ." Then followed a blank space without any mention of the names of beneficiaries or their interests. The will was duly signed and attested. The widow moved the court for a grant of probate of both wills, omitting the revocatory clause in the second will. His Lordship found as facts that the testator was "a most careful "man who took good care of his property, had a clear notion "of what he wanted to do with it, and did not desire to die "to any extent intestate. He made a will in 1934 which "disposed most carefully of every item of his property, and "I have no doubt that he was endeavouring to do exactly "the same thing in 1939. He made the second will because "he thought the language of the first will was unnecessarily "obscure, and, because some of the beneficiaries under the "will of 1934 having died, he desired to bring his dispositions "up to date." There was no evidence to show that he had in any way varied his desires between 1934 and 1939.

Clifford Mortimer for the applicant.

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Marshall Reynolds for a relative interested in the event of partial intestacy.

LANGTON J. This matter is not simple, and, so far as I know, it is not directly covered by any authority. The mere fact that the whole estate is not disposed of is no reason for ignoring a will, and there is authority for the proposition that the court may admit to probate as a good and complete testamentary disposition, a will which contains a clear revocatory clause and yet does not dispose of the whole estate, thereby leaving the testator to a certain extent intestate. The duty of the court is, if it be possible, to collect and give effect to the manifest intentions of the testator. In doing so, the court is, of course, restrained from any attempt to make for the testator a new will which he has not made himself. The court is only entitled to give effect to what appear to be clear intentions and to admit to probate such documents as will give effect to those intentions.

I have to see whether it was the real intention of the testator that the later will should remain as it is, or whether I would more nearly be giving effect to his intention by admitting to probate the earlier will as well. There is something to be said for both courses. If the second will were left as it stands, one would at least have the assurance that effect had been given to some of the testator's intentions, and that no effect had been given to any intention which he did not mean to be carried out. If I were to admit the earlier document as well, I should be covering the whole of the testator's property, but there is the possibility (I think it is only a small one) that I should be giving effect to something which was not his intention. In the absence of any evidence that his intentions towards his legatees had varied and the absence of any evidence of events which were likely to make those intentions vary, it does not seem to me that the second risk is very great. Mr. Mortimer has prayed in aid the doctrine of dependent relative revocation. The name of this doctrine seems to me to be somewhat overloaded with unnecessary polysyllables. The resounding adjectives add very little, it seems to me, to any clear idea of what is meant. The whole matter can be quite simply expressed by the word "conditional," as Atkin L.J. explained in *Adams* v. *Southerden* (1), and the question which arises is whether or not

(1) [1925] P. 177, 185.

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the revocatory clause is inserted conditionally, the condition being that a new will should be set up by the document in which the revocatory clause appears. The new matter that this case introduces is whether it is possible to say that the revocatory clause is conditional when part of the document in which it is included is good and should be admitted to probate. I do not think that there is any insuperable difficulty in adopting that view in this case, but I would like to repeat that in such matters the court must be abundantly clear that it is giving effect to the testator's intention. I have no doubt that the revocatory clause was inserted by the testator because he wanted to get rid of the first will and to give full priority to the second will, but he did not succeed in concluding his second will.

It is clear from *Sotheran* v. *Dening* (1), a case of great authority, that it is the business of the court in this matter, if possible, to give effect to the intentions of the testator. In *Dancer* v. *Crabb* (2), Sir James Hannen cited a passage from the judgment of Sir William Grant M.R. in *Ex parte the Earl of Ilchester* (3), as follows: "The rule of the civil law is, "Tunc prius testamentum rumpitur cum posterius perfectum "est. In *Limbery* v. *Mason* (4) that is laid down as the rule "of our law. There is no doubt but the testator by any "writing, etc., or by any cancelling designed merely to dis- "annul the former will, might have revoked it without more; "but he designed to do it by a new will, and unless such "writing be effectual to operate as a will it shall not amount "to a revocation." Sir James Hannen then goes on: "The "decisions cited from *Clarke* v. *Scripps* (5) down to *Eckersley* "v. *Platt* (6) do not affect the application to the present "case of the earlier authorities I have referred to. They "enforce under varying circumstances the principle that "although the testator does an act which unexplained would "be one of revocation, yet if it appear that he did it only as a "part of the means of setting up another will, if that end be "not accomplished the former will is not revoked." I could not rely on that as being anything like direct authority for the course I am taking. It is direct authority for the proposition that, if the second will failed, the first will would not

(1) (1881) 20 Ch. D. 99, 105.
(2) (1873) L. R. 3 P. & M. 98, 104.
(3) (1803) 7 Ves. 379.
(4) (1734) 2 Com. 451.
(5) (1852) 2 Rob. E. 563.
(6) (1866) L. R. 1 P. & M. 281.

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be necessarily destroyed by the existence of the revocatory clause in the second will, but in this case, ex concessis, the second will does not fail. It is only incomplete. But I think that *In the Goods of Irvine* (1) and other cases justify me in taking the action which I intend to take here in reliance on the doctrine of conditional revocation. I hold that the testator inserted the revocatory clause into the second will conditionally on concluding that will, and, as he failed to conclude it, the best effort I can make to give effect to his testamentary dispositions, as we know them, is to decree that the second will shall be admitted to probate with the first will, omitting the revocatory clause in the second.

Probate granted accordingly.

Solicitors for applicant: *Cooper, Bake, Fettes, Roche & Wade.*

Solicitors for party interested: *Smith, Rundell, Dods & Bockett.*

(1) [1919] 2 I. R. 485.

W. L.

1942

Apr. 27, 28; *June* 23.

THE OROPESA.

Estoppel—Maintenance of action—Previous action between same parties—Different cause of action—Collision at sea—Claim by administrators for loss of life—Previous claim as personal representatives for loss of effects.

Negligence—Damage—Remoteness—Novus actus interveniens.

Two steam vessels, the *M. R.* and the *O.*, came into collision. Although the *M. R.* was badly damaged her master thought that she could be salved. He had sent fifty of his crew in two of his boats to the *O.*, and, about an hour and a half after the collision, he decided himself to go to the *O.* and confer with her master on the measures to be taken. The master launched another lifeboat in which he embarked with sixteen men, including the sixth engineer. The weather was rough and it got worse, and before the boat could reach the *O.* it capsized and nine of the men in her, including the sixth engineer, were drowned. The *M. R.* subsequently sank. In an action by the owners of the *M. R.* against the owners of the *O.* the parents of the deceased sixth engineer joined as plaintiffs as his personal representatives suing for his lost effects. The court found the *M. R.* four-fifths to blame and the *O.* one-fifth, and accordingly, the parents of the

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sixth engineer were held to be entitled to recover against the owners of the *O.* in respect of the loss of his effects. The parents now brought an action against the owners of the *O.* under the Law Reform (Miscellaneous Provisions) Act, 1934, as administrators of the estate, claiming damages in respect of the abbreviation of their son's life, and also, in their own right, damages as part-dependants under the Fatal Accidents Acts:—

Held, (i.) that the death was not the result of a novus actus interveniens, but was directly caused by the collision; (ii.) that the cause of action under the Law Reform (Miscellaneous Provisions) Act was different from that on which the plaintiffs' claim in the collision action had been founded, and that they were entitled to damages under that Act as well as under the Fatal Accidents Acts.

Brunsden v. *Humphrey* (1884) 14 Q. B. D. 141 applied.

ACTION for damages in respect of loss of life.

The plaintiffs were Edwin and Alice Lord, the parents of Arthur Lord, deceased, the sixth engineer on board the steamship *Manchester Regiment*. The defendants were the Pacific Steam Navigation Co., owners of the steamship *Oropesa*. The plaintiffs' action arose out of a collision between the *Manchester Regiment* and the *Oropesa* off the coast of Nova Scotia on December 4, 1939. On October 3, 1940, the court found the *Manchester Regiment* four-fifths to blame and the *Oropesa* one-fifth. In that action the present plaintiffs, as personal representatives of the deceased, joined as plaintiffs and recovered damages against the defendants in respect of the loss of personal effects of the deceased. They now claimed damages under the Law Reform (Miscellaneous Provisions) Act, 1934, as administrators of their son's estate for the abbreviation of his life, and also, on their own behalf, as part-dependants under the Fatal Accidents Acts.

It was quickly apparent after the collision that the *Manchester Regiment* was seriously damaged. Steam was kept to the last possible moment, but the engine-room filled quickly and the ship was without lights or steam within thirty minutes. Meanwhile, signals were made by lamp to the *Oropesa* saying that the *Manchester Regiment* was badly holed and asking for the *Oropesa* to stand by. The *Manchester Regiment*, in her master's view, was an exceptionally strong ship, and he came to the conclusion that when the engine-room and stokehold had filled to the outside sea level she would still float on her bulkheads. Accordingly, having first sent to the *Oropesa* fifty of his ship's complement of seventy-

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four in the two port lifeboats, he decided, about an hour and twenty minutes after the collision, to go personally on board the *Oropesa* and there concert with her master all possible measures for the salvage of the *Manchester Regiment.* He embarked in the starboard lifeboat with sixteen members of the crew, including the deceased. The weather conditions were rough and a cross swell, running against the sea, became worse. After thirty minutes the boat capsized and only eight of the seventeen who had been in her succeeded in clambering on to the up-turned keel. They were rescued at dawn by a boat from the *Oropesa,* the deceased not being among those who were saved. The *Oropesa* had herself sustained serious damage in the collision, and it was judged unwise for her to stand by the *Manchester Regiment.* The seven remaining members of the crew left on board the *Manchester Regiment* were, therefore, taken on board the *Oropesa* and that vessel returned to Nova Scotia. The *Manchester Regiment* was never sighted again. The Elder Brethren took the view that the master of the *Manchester Regiment* did the best that any man could have done in the circumstances.

E. W. Brightman for the plaintiffs. There is no question but that the *Oropesa* was partly to blame for the collision. That is res judicata, and the chain of causation was not broken. The burden of showing that it has been broken is on the defendants, and it can only be broken by an unwarrantable act and not merely by an error of judgment : *Canadian Pacific Ry. Co.* v. *Kelvin Shipping Co.* (1) The decision to leave his ship was forced on the master of the *Manchester Regiment.* It was his duty to minimize the loss if he could. He could not do so without taking a decision, and the decision which he took was, in all the circumstances, not only reasonable but the best thing he could do.

Sellers K.C. and *Owen Bateson* for the defendants. So far as the claim under the Law Reform (Miscellaneous Provisions) Act, 1934, is concerned, there is an estoppel, for the claim for loss of effects put forward in the collision action was by the same plaintiffs in respect of the same estate and against the same defendants, and the damages now claimed should have been claimed in that action : see Salmond on Torts, 9th ed., pp. 133 and 163. The death of the deceased did not arise from the fault of the *Oropesa,* but from the act of the master

(1) (1927) 138 L. T. 369.

in leaving the *Manchester Regiment* when he did, which was a novus actus interveniens. The claim must arise directly from the original negligence: see *Harnett* v. *Bond* (1), *The San Onofre* (2), and *The Paludina* (3), and the onus is on the plaintiffs to establish that contention and here it did not do so.

Brightman in reply. The plaintiffs are entitled to bring their action under the Law Reform (Miscellaneous Provisions) Act, for the defendants' negligence infringed different rights from those in respect of which the claim for lost effects arose: *Brunsden* v. *Humphrey* (4).

Cur. adv. vult.

1942. June 23. LANGTON J. read a judgment in which he said: The substantial and main issue is whether the deceased lost his life as a direct consequence of the collision between these two vessels. The question, however, has also been raised whether or not the plaintiffs are estopped from maintaining the present action by reason of the fact that in previous proceedings they put forward a claim in respect of the loss of the effects of the deceased. The answer to the contention of the defendants that the plaintiffs are so estopped seems to lie in the majority decision of the Court of Appeal in *Brunsden* v. *Humphrey* (4). In that case a cab driver, having already successfully brought an action to recover damages in respect of damage to his cab, brought a second action for personal injuries. It was contended that he could not sue twice for what were in fact damages arising from the same event, but the Court of Appeal pointed out that the causes of action in respect of which the two claims were brought were different, and that, therefore, there was no bar to the second action. Applying this decision to the present case, it is clear that the cause of action on which the plaintiffs now base their claim as administrators to the estate of the deceased is totally different from that on which their claim in the collision action was founded.

The question now arises whether the death of the deceased was the direct consequence of the negligence of the defendants in causing or contributing to the collision between the vessels, or whether, as contended by Mr. Sellers, it resulted from a novus actus interveniens, namely, the decision of the captain to make the journey between the two ships at that particular

(1) [1925] A. C. 669.
(2) [1922] P. 243.
(3) [1927] A. C. 16.
(4) (1884) 14 Q. B. D. 141.

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and, as it turned out, unfortunate moment. In support of his contention Mr. Sellers raised the following considerations: (i.) that the captain's decision was an independent and voluntary act; (ii.) that this act was not forced on him by the circumstances, since he admitted that he had no fear that the *Manchester Regiment* would sink before daylight, and (iii.) that the cross sea which caused the boat to capsize was of short duration and that the captain admitted that the conditions would have been better after daylight. I have treated the matter on the footing that the burden of proof is on the plaintiffs. I can well believe that in this case a higher tribunal might find itself divided on the question of causation. On the one side it is true that over an hour had elapsed between the collision and the captain's determination to go on board the *Oropesa*. It is equally true that he was not absolutely compelled to take this step at the moment that he did by the presence of imminent danger, and to that extent his action can properly be described as voluntary and independent. On the other hand, I cannot help feeling that in the phrase used by Lord Sumner in *The Paludina* (1), "the hand of the original "wrongdoer was still heavy on his ship and his own navigation "was not the sole human agency determining her fortunes." Lord Sumner used this phrase in describing the situation of the captain in *The City of Lincoln* (2), but I think it applies with force mutatis mutandis to the present circumstances. The captain here was full of confidence that his own skill and that of his crew would avail to rescue his ship, but, in truth, his vessel was in pretty desperate straits. He was taking chances and he knew it when he decided to go on board the *Oropesa*. The situation was such that risks had to be accepted, and the situation had been created by the collision. In my view, on these facts the deceased's death was directly caused by the collision.

His Lordship assessed the damages at 200*l.* under the Law Reform (Miscellaneous Provisions) Act, 1934, and 50*l.* under the Fatal Accidents Acts.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Gibson & Weldon, for John Whittle, Robinson & Bailey, Manchester.*

Solicitors for defendants: *Middleton, Lewis & Clarke, for Batesons & Co., Liverpool.*

(1) [1927] A. C. 16, 27. (2) (1890) 15 P. D. 15.

E. C. M. T.

THE MAJFRID.

C. A.
1942
July 22.

Shipping—Damage at berth—Barges moored by wharfingers in safe position—Removal by other parties to part of berth which was unsafe—Duties and obligations of wharfingers.

The plaintiffs' barges were left properly moored in a safe berth alongside the second defendants' wharf to which they had come to discharge and load cargoes. During the night the ship of the first defendants arrived off the wharf, but, as the time at which she was due to arrive was not known, there was no one on the wharf to give her berthing directions. To enable the ship to get alongside the wharf, her crew, on the pilot's instructions, moved the barges further up the wharf where the ground, unknown to the pilot, but to the knowledge of the second defendants, was unfit for barges to ground on. When the second defendants' foreman arrived one of the barges was already aground, but the other was afloat. There were no lightermen on the wharf to move her and the foreman did not ask the ship's crew to do so. Both the barges received damage :—

Held, that, in moving the barges, the first defendants committed a trespass, and that they were not entitled to assume that the whole frontage of the wharf was a safe berth for vessels to lie and take the ground ; that there was no continuing duty on the second defendants, who had left the barges safely moored, to warn the plaintiffs that the barges had been moved to an unsafe place, and that they were not guilty of a breach of duty in not taking any measures to move the barge which was still afloat from a berth in which they had not placed her ; and, therefore, that the first defendants were solely responsible for the damage.

Judgment of Bucknill J., ante p. 43, affirmed.

Appeal from Bucknill J.

The facts are fully set out in the report of the case in the court below (ante pp. 44–45), and for the purposes of this report are sufficiently stated in the headnote. Bucknill J. found the first defendants alone to blame. The first defendants appealed.

Trapnell K.C. and *E. W. Brightman* for the first defendants.

Owen Bateson for the plaintiffs.

Sir Robert Aske K.C. and *Honeyman* for the second defendants.

[The argument for the first defendants was the same as in the court below. Counsel for the other parties were not called on.]

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THE COURT (SCOTT, MACKINNON and GODDARD L.JJ.) dismissed the appeal.

SCOTT L.J. We are unanimous in the view that the judgment is right. We appreciate Mr. Trapnell's endeavour to make something out of a very difficult position, but there is only one thing to say, and that is, "Dismissed, with costs."

Appeal dismissed.

Solicitors for first defendants: *Bentleys, Stokes & Lowless.*
Solicitors for plaintiffs: *J. A. & H. E. Farnfield.*
Solicitors for second defendants: *Constant & Constant.*

E. C. M. T.

1942

May 21, 22; June 12.

IN THE GOODS OF MANN, DECEASED.

Probate—Will—Signature—Separate documents—Signature on envelope containing paper bearing dispositive clauses—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 9—*Wills Act Amendment Act,* 1852 (15 *&* 16 *Vict. c.* 24), *s.* 1.

A testatrix wrote out her will on a sheet of paper. One of the attesting witnesses was present during the whole of the time in which she, the testatrix, was so engaged, and the other attesting witness was present during the writing of the latter part of the paper. After completing the paper the testatrix wrote on an envelope the words: "The last will and testament of Jane "Catherine Mann." She then pointed out to the two witnesses that the documents which she had written were her will, and requested the witnesses to sign their names as witnesses thereto. Thereupon the two witnesses, in the presence of the testatrix and in the presence of one another, subscribed the paper containing the dispositive clauses, their signatures appearing at the foot of the document underneath an attestation clause which was worded: "In the presence of witnesses." After the witnesses had signed the document the testatrix placed it in the envelope, but she did not place any signature on the document. The paper and the envelope were deposited with the bankers of the testatrix for some six months, at the end of which time she took the will to her home. Soon afterwards she was admitted as a patient to a hospital and she took the will with her. Her executrix visited her at the hospital, and, at the request of the testatrix, obtained a further envelope and sealing-wax, and the testatrix placed the will in its own envelope, superscribed as already mentioned,

together with other documents, in the covering envelope. Having sealed the covering envelope with sealing-wax she handed that envelope and its contents to her executrix, who kept them untouched until the death of the testatrix :—

Held, that probate would be decreed of the two documents, the signature on the envelope being accepted as the signature of the will, since (1.) the circumstances were so plain and well-ascertained as to preclude all possibility of fraud, (2.) the envelope had a far closer relationship to the document which it enclosed than a second and wholly disconnected piece of paper would have had, (3.) both the envelope and the paper were holograph documents written on the same occasion, (4.) both documents were written in the presence of the attesting witnesses save, in the case of one witness, the first part of the dispositive paper, and (5.) the history of the documents from the time of their being made to that of the death of the testatrix had been clearly ascertained and provided strong confirmatory evidence of the genuine nature of the transaction.

MOTION for grant of probate.

The executrix of Jane Catherine Mann, who died on July 1, 1941, moved the court for a grant of probate of two documents, (1.) a holograph disposition of the testatrix's estate bearing date September 4, 1940, and (2.) an envelope containing the same, as the will of the testatrix.

The facts sufficiently appear in the headnote.

Dorothy Knight Dix for the executrix.

Waddy for parties interested on an intestacy.

Cur. adv. vult.

1942. June 12. LANGTON J. read a judgment in which he stated the facts, and continued : On the facts there cannot be any doubt of the intentions of the testatrix, and I am satisfied that she intended the two writings which she made on September 4, 1940, that is, the attested document and the signed envelope, to constitute her last will. In her view, no doubt, the full and complete signature on the envelope constituted a sufficient signature to her will. There is no suggestion that the dispositions contained in the written paper do not represent her wishes as to the distribution of her property. The sole difficulty which arises is as to the sufficiency of the signature on the envelope. There is no lack of guidance both in statute and in case law as to what shall and shall not be treated as a sufficient signature to a will.

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Section 9 of the Wills Act, 1837 (1), gave rise to much litigation, and by s. 1 of the Wills (Amendment) Act, 1852, a considerable extension was given to the words "at the foot or end." It is unnecessary to recapitulate here the whole terms of this long section since it is not suggested that, wide though they be, there are any exact words which apply to the present case. It is not, however, unimportant to observe that towards the end of the section these words occur: "and the enumeration "of the above circumstances shall not restrict the generality "of the above enactment," a provision which seems plainly to exclude the application of the rule of ejusdem generis.

In construing and applying these statutory provisions the courts have laid down and held fast to the rule that no document can be allowed to form part of a will which was not physically or otherwise connected to the signed portion of the will at the moment of signature. Thus, in *In the goods of Horsford* (2) Sir James Hannen granted probate of a will in which the signature and attestation clause appeared on a separate piece of paper which was attached by string at the time of signature to the papers containing the dispositive clauses. By contrast, the same judge in *In the goods of J. Hatton* (3) refused probate of a will consisting of two separate papers, one of which had been written out by one of the attesting witnesses and the other by the second witness. The dispositions in each case were to the same effect, but in different words. The testator signed one paper and the witnesses the other. In refusing probate Sir James Hannen observed: "A will may be composed of numerous papers "which together make but one instrument; but these are "separate and independent documents." Many years later, in *Lewis* v. *Lewis* (4), Bargrave Deane J. very slightly relaxed the rule as to physical attachment by granting probate to a will contained on two half-sheets of paper which were held

(1) By Wills Act, 1837, s. 9: "No will shall be valid unless it "shall be in writing and executed "in manner herein-after men- "tioned; (that is to say,) it "shall be signed at the foot or "end thereof by the testator, or "by some other person in his "presence and by his direction, "and such signature shall be "made or acknowledged by the "testator in the presence of two "or more witnesses present at "the same time, and such "witnesses shall attest and shall "subscribe the will in the pre- "sence of the testator, but no "form of attestation shall be "necessary."

(2) (1874) L. R. 3 P. & M. 211.

(3) (1881) 6 P. D. 204.

(4) [1908] P. 1.

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together at the moment of signature by the testator's finger and thumb.

The only case which has been cited to me, or which I have been able to discover, in which a paper and an envelope have been admitted to probate as together constituting a will is *The goods of Almosnino* (1). That case is sharply distinguishable from the present on more than one ground. The paper containing the testamentary disposition was signed by the testatrix but was not attested, the exact converse of the present facts. The deficiency, however, was made up by a memorandum set out on the covering envelope, and set out in the most specific terms: "I confirm the contents written "in the enclosed document in the presence of Richard Morse "and Sarah Praeger this 29th day of December, 1858. "A. Almosnino. Richard Morse, 8, Charing Cross. Sarah "Praeger, 25, Esher Street, Upper Kennington Lane." There was evidence that Richard Morse had written out this memorandum for the testatrix and that she had signed it in the presence of the two witnesses who had in turn signed in her presence and in the presence of each other. The only particular in which that case is weaker than the present is the fact that, whereas in this case both witnesses actually witnessed the writing of the will which they attested, in *The goods of Almosnino* (1) it seems that neither of them ever saw the paper which was enclosed in the sealed envelope which they signed. In the circumstances that case forms very little of a precedent for the present case, more especially as the judge, Sir Cresswell Cresswell, naturally focussed his attention almost entirely on questions of admissibility of parol evidence and as to sufficiency of proof of identity of the testamentary document, matters which do not arise here. If it had been necessary to press the matter so far, it might perhaps have been argued, in *The Goods of Almosnino* (1), that the paper and envelope were physically attached at the time of the second signature and attestation thereof, since at that moment the paper was sealed up inside the envelope. In the present instance, however, it seems clear that the paper was not inside or in any way connected with the envelope at the time when the testatrix wrote her name on the envelope.

The rule as to attachment, physically or otherwise, of the documents, is clearly designed to obviate the possibility of fraud. In this case it has been urged on me, without undue

(1) (1859) 29 L. J. (P.) 46.

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insistence, by Mr. Waddy, that any relaxations of the just and salutary rule of long-standing might open an undesirable door. Speaking generally, I am not much impressed by forensic forebodings of indeterminate future disaster. I have a comforting conviction that the judges who succeed me will prove able to safeguard the law, but in this instance I own to a certain feeling of uneasiness lest the relaxation of a good rule in a most exceptionable case should amount to good news for bad people by making it appear that this court was now less jealous than of yore to secure the door against fraud. Therefore, although I am prepared to decree probate of this will by accepting the signature on the envelope as the signature to the will, I desire to draw attention pointedly to the very exceptional circumstances which have impelled me to this course. The rule as to attachment of documents is, as Miss Dix pointed out in her very clear argument, a rule intended as security against fraud. Where the circumstances are so plain and so well-ascertained as to preclude all possibility of fraud, the reasons supporting the strict application of the rule are greatly diminished. I do not say that they altogether disappear, for there is always a certain safeguard against subsequent possibilities of fraud in the preservation of an unvarying rule. Secondly, if an unattached paper is to be admitted at all, there is much to be said in favour of an envelope which may reasonably be held to have a far closer relationship to a document which it encloses than a second and wholly disconnected piece of paper. Envelopes are, by their nature, designed to have what may be described as a dependent and secondary existence rather than an independent and primary life of their own. This consideration clearly distinguishes the present case from *In the goods of J. Hatton* (1). Thirdly, the will in the present case is a holograph document, and was written with the same pen and on the same occasion as the envelope. Fourthly, both paper and envelope were written in the presence of the attesting witnesses, the first witness being present during the whole of the writing of both documents and the second during the writing of the envelope and the latter part of the dispositive paper. Finally, the history of the documents between the time of their making and the date of the death of the testatrix has been clearly ascertained and provides strong confirmatory evidence of the completely genuine nature of the transaction. It is always

(1) 6 P. D. 204.

imprudent to attempt anything in the nature of prophecy in matters of this description, but it is difficult to imagine that circumstances of this kind will easily or frequently repeat themselves, and in this reflection I find a certain measure of consolation in departing reluctantly from a rule which I believe to be both salutary and wise. The motion succeeds, with costs of both parties out of the estate.

Solicitor: *Mark Lemon.*

W. L.

Distinguished. TUCKER *v.* T. [1949] P. 105

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1942
July 14.

Divorce—New trial—Public interest—Undefended petition—Omission of respondent to defend to enable petitioner to obtain decree—Material facts alleged not to be before court—Matrimonial Causes Rules, 1937, *r.* 36, *sub-r.* 1.

A wife having petitioned for a divorce on the ground of desertion, the husband did not resist the petition because he thought that she would be happier if she were freed from the marriage. The wife having been granted a decree, the husband moved a Divisional Court of the Divorce Division for a new trial on the ground that he had not been guilty of desertion and that all the material facts had not been before the court which tried the wife's petition:—

Held, that, as the court must consider the public, as well as the private, interests involved in matrimonial matters, and as the question of status was involved and the position of a child of a marriage was deeply affected by a decree of dissolution, the petition could not be treated as a mere private piece of litigation, and, therefore, the conduct of the husband should not be allowed to affect the matter and a new trial should be granted under r. 36, sub-r. 1, of the Matrimonial Causes Rules, 1937, the husband being ordered to pay the costs of the wife's suit and of the application for a new trial.

MOTION for a new trial of a divorce suit.

The husband, Joseph Sim Winter, and the wife, Edith Eleanor Winter, intermarried on May 7, 1924. There was one child of the marriage, a boy born on August 23, 1925. In 1930 the husband failed in his business, and the wife went to reside with her parents, the parties living apart until 1933. On several occasions the husband pressed his wife to return to him, but she declined on the ground that his proposals were neither practical nor attractive. On October 4, 1940, the

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wife filed a petition asking for a dissolution of her marriage on the ground of her husband's desertion. When the petition was served the husband was ill, and he sent the petition to his solicitor without devoting any attention to it. In September, 1941, he consulted his solicitor and fully discussed his position. He stated in his affidavit on the present motion: "We eventually agreed that I should not defend the petition, "but should let the matter go. I thought at the time, as my "wife had refused my request to return and live with me, she "had definitely made up her mind not to come back, and the "best thing to do was to let her have her divorce as she must "have met someone she cared for and I did not want to stand "in the way of her happiness. Accordingly, I did not enter "appearance to the said petition or take any part in the trial "thereof." On February 27, 1942, the wife's petition was heard at York Assizes before Birkett J., and a decree nisi was granted to her on the ground of her husband's desertion during the three years immediately preceding the presentation of the petition.

L. F. Sturge for the husband. It is in the public interest, in view of the importance of matrimonial status, that there should be a rehearing.

Tyndale for the wife. The authorities show that under r. 36, sub-r. 1, of the Matrimonial Causes Rules, 1937, and the equivalent rules which preceded it, such a motion cannot succeed unless there has been surprise or some evidence was not available to the applicant at the time of the original trial. Neither factor exists in this case. The proper course for the husband to follow was to place the alleged suppression of material facts before the King's Proctor to give him the opportunity of intervening if he deemed fit.

LANGTON J. This application raises a point of some importance on the construction of r. 36, sub-r. 1, of the Matrimonial Causes Rules, 1937. The historical origin of the rule is material. It is the lineal descendant and almost the literal derivative of r. 46 of the Matrimonial Causes Rules, 1924, which in turn derived from r. 62 of an earlier set of rules and marked the time at which a considerable body of matters of appeal were transferred from this court to the Court of Appeal. Rule 46 expressed, and r. 36 expresses, the whole of the residuum of appeal jurisdiction which has been left to this

court as regards matters originating in the court itself as distinct from the appellate jurisdiction of this court from courts of summary jurisdiction. The material words of the rule are: "An application for rehearing of a cause, heard "by a judge alone where no error of the court at the hearing "is alleged, shall be made to a Divisional Court of the Probate "Division."

The husband asks for a rehearing of the wife's petition on the ground that the decree was against the justice of the case in that it was untrue that he ever deserted his wife, and that he now wishes to put the real facts before the court.

Obviously, such an appeal, so far as the husband is personally concerned, has no vestige of merit. In the full possession of his senses and with competent legal advice, he determined not to defend the petition but to let the matter go. So far, therefore, as he personally is concerned there can be no reason in law or in justice why he should now be allowed to retract that determination and put his wife to the trouble, expense and annoyance of a rehearing. In matrimonial matters, however, there is always something more to be considered than the mere individual merits of the parties. The Matrimonial Causes Act, 1937, has laid stress on the duty of the court to consider the public as well as the private interests involved in matrimonial matters, and it must also be remembered that a question of status is involved and that the position of any child or children of the marriage is deeply affected by a decree of dissolution. Accordingly, it would not be right to treat this matter as if it were a mere private piece of litigation in any other division of the Supreme Court.

Applications for rehearing under r. 36, sub-r. 1, are limited in two ways. First, the rule is only concerned with causes heard by a judge alone, and, secondly, the rule only applies to those causes in which no error of the court at the hearing is alleged. My first impression on reading the rule was that it must necessarily be confined to a comparatively small class of causes, and I gave expression to that view in *Manners* v. *Manners and Fortescue* (1). I am still sufficiently optimistic to believe that such appeals will be few, but I must acknowledge that in 1936, when I was concerned with the earlier r. 46, I did not contemplate the possibility of an appeal put forward, as this has been, on grounds of public interest. Apart from the President's very helpful review of the historical origin of r. 46, I do not

(1) [1936] P. 117, 127.

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think that *Manners* v. *Manners and Fortescue* (1) provides much assistance in the present instance.

Mr. Sturge's point throughout, and it is a strong one, has been that it cannot be in the public interest to allow to stand a divorce decree which, on the evidence before us, would appear to have been granted on an erroneous basis, and he contended that personal laches, negligence or even delinquency on the part of the husband is wholly immaterial. In my view, if, without attempting to determine the matter finally, this court has good reason to believe that the husband did not desert the wife, we ought in the public interest to order a rehearing if we have power to do so.

In *Manners* v. *Manners and Fortescue* (1) both the President and myself were concerned lest, in allowing the appeal, we might trench on an appellate jurisdiction which was reserved to the Court of Appeal. In the present case, being satisfied that there was no possibility of an appeal to the Court of Appeal, I have been more troubled by the question whether there was any right of appeal to this court. It is clear that there has never been any intention on the part of the rules committee, if any such power resides in them, to extend the area of appeal in this class of case. If, therefore, there was no right of appeal in such a case before the present r. 36, sub-r. 1, came into existence, that rule certainly did not create such a right. My doubts on this aspect of the matter have been set at rest by *Lester Jones* v. *Lester Jones and Stirrett* (2), where the court was moved under the then existing r. 62 to grant a rehearing on the ground that the co-respondent, who had deliberately stood aside at the hearing of the petition, considered that an award of damages made at the hearing was excessive. The court refused to grant the rehearing, but no suggestion was made, either by the respondent or by the court itself, that there was not power on the part of the court to grant the rehearing if it thought that course desirable. In that case, as in the present case, no error of the court was alleged, and the complainant, as here, admitted that he had had full notice of the proceedings and had of his own volition elected to stand aside from them. Nevertheless, the court evidently considered that it had power to consider his application.

In my view, therefore, the decree granted in the present case should be set aside and a rehearing should be granted on condition that the husband pays the whole of the taxed costs of

(1) [1936] P. 117. (2) (1920) 123 L. T. 584.

the wife's suit to date and the whole of the taxed costs of this application.

HENN COLLINS J. I concur. This application succeeds on the basis that there was no error in the court below which is a sine qua non of the appellate jurisdiction of this court in matters arising in the High Court. As the wife swore that the husband had left her on a named date it could not be said that there was no evidence on which the learned judge who tried the case could find that he had deserted her, but to find that one party left the other without saying more about the circumstances of the parting is not a satisfactory way of disposing of a case. I should not like it to be thought from this decision that we are doing anything to lessen the necessity, in cases of alleged desertion, of examining closely the circumstances in which the parting took place or that such statements as "one spouse left the other" are sufficient to establish a case of desertion without a great deal more.

Rehearing ordered.

Solicitors for husband: *Hyde, Mahon & Pascall, for F. J. Lambert & Co., Gateshead.*

Solicitors for wife: *Gibson & Weldon, for Tasker, Hart & Munby, Scarborough.*

W. L.

END OF VOL. AND OF PROBATE SERIES FOR 1942.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1942, will be as follows :—

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12. —— —— *Service of petition — Dispensation—Respondent resident in Germany— "Enemy" — R. S. C., Or.* IX., *r.* 14B— *Matrimonial Causes Rules,* 1937, *rr.* 10, 81.
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WORDS:—
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BIBL. LONDIN